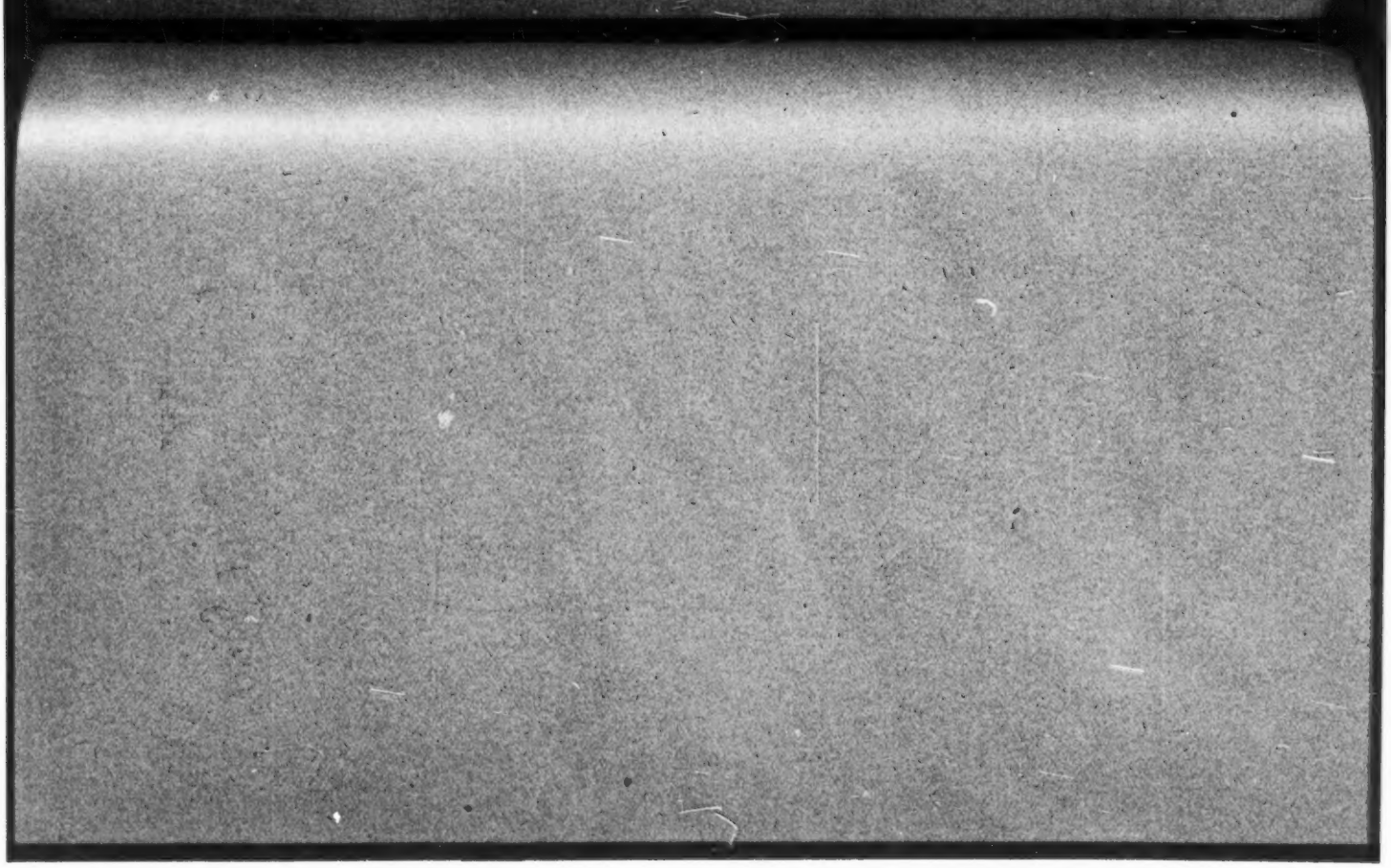

No. 143

Brief of Black for D.C. (ins.)

17033

FILED

OCT 10 1899

JAMES H. McKENNEY, Clerk.

No. 419

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed October 10, 1899.

JACOB GARDNER et al.,
Plaintiffs in Error,

Against

EBENEZER WORMOUTH,
Defendant in Error.

Notice of Submission of Motions to Dismiss and Affirm, etc.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

Filed ..... *1899.*

IN THE SUPREME COURT OF THE UNITED STATES.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

Against

EBENEZER WORMOUTH, DEFENDANT IN ERROR.

The defendant in error, by his counsel, appearing in that behalf, moves this Honorable Court to dismiss the writ of error in the above-entitled cause, for want of jurisdiction, because the judgment and decree which is sought to be reviewed by said writ is a judgment duly made and given and entered by the Supreme Court of one of the United States, to wit, the Supreme Court of the State of California, and it fully appears from the record herein:—

First. That no Federal question is involved in the action in which said judgment was rendered, either in the Superior Court or Supreme Court, of the State of California.

Second. It does not appear from the record that the validity of any treaty or statute, or an authority exercised under the United States, was at any time drawn in question in said action.

Third. It does not appear from the record that the validity of any statute, or authority exercised under any State has been drawn in question in said action, upon the ground of its being repugnant to the Constitution, treaties or laws of the United States.

Fourth. That it does not appear from the record, that any title, right, privilege, or immunities claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States has been drawn in question in said action.

Fifth. That it does appear from the record that the only question involved in said action was a question of fact—namely, the western boundary of the Rancho Corte de Madera del Presidio.

And the said defendant in error by his counsel, as aforesaid, also moves this Court to affirm the judgment and decree to review which

said writ of error was herein brought, because it is manifest from the record herein that the reasons assigned for taking the writ of error were and are frivolous, and that it was taken for delay only.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

JACOB GARDNER ET AL., PLAINTIFFS IN ERROR,

Against

EBENEZER WORMOUTH, DEFENDANT IN ERROR.

Notice of Submission of Motions to Dismiss and Affirm.

TO GEORGE W. MONTEITH, ATTORNEY FOR PLAINTIFFS IN ERROR:—

Please take notice that on Monday, the 9th day of October, 1899, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States, at the courtroom of said Court, in the Capitol Building, in Washington, D. C., for the decision of said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

ALFRED L. BLACK,
Attorney for Defendant in Error.

C. K. BONESTELL,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1899.

JACOB GARDNER ET AL., PLAINTIFFS IN ERROR,

Against

EBENEZER WORMOUTH, DEFENDANT IN ERROR.

Statement of the Case.

In July, 1892, defendant in error, commenced this an ordinary action in ejectment against plaintiffs in error, in the Superior Court of the State of California, in and for Marin County. The complaint was answered, and subsequently a cross-complaint was filed by plaintiffs in error.

It is unnecessary to make a further statement, inasmuch as the facts are fully set out in the pleadings and findings of fact; the opinion of the Supreme Court of the State being also by rule a part of the record, is included herein.

The complaint in said action is as follows:—

Complaint.

[Title of Court and Cause.]

"Ebenezer Wormouth, plaintiff, complains of Peter Gardner and Jacob Gardner, defendants, and for cause of action avers:—

I. That on the 1st day of February, A. D., 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked 'C. M. P. 180,' said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to post marked 'C. M. P. 181;' thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26 00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28,

and lot 3 of section 29, township No. 1 north of range No. 6 west, M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

II. That on, to wit, the said first day of February, A. D., 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same, (except that portion thereof bounded and described as follows, to wit: Beginning at a post marked 'C. M. P. 180'; running thence due north 2.45 chains to a post marked 'C. M. P. 181'; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending the said creek to a point of beginning); and ever since have wrongfully and unlawfully withheld and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars, ($500.00).

III. That the reasonable monthly value of the rents and profits of said land and premises is about Fifty Dollars per month, and that by reason of the unlawful withholding of said land and premises by defendants as aforesaid, plaintiff has been deprived, and by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of Fifty Dollars per month.

SECOND.

And for another, further and separate cause of action, and for the purposes of equitable relief, plaintiff avers and shows:

IV. That on the 1st day of February, A. D., 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked 'C. M. P. 180,' said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 245 chains to a post marked 'C. M. P. 181'; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28

and lot 3 of section 29, township No. 1 north of range No. 6 M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

That on, to wit, the said 1st day of February, A. D. 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except that portion thereof bounded and described as follows, to wit: Beginning at the post marked 'C. M. P. 180'; thence running due north 245 chains to post marked 'C. M. P. 181'; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending said creek to the point of beginning), and ever since have wrongfully and unlawfully withheld, and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars ($500).

That the value of the rents and profits of the said land and premises while this plaintiff has been excluded therefrom is the sum of fifteen hundred dollars ($1,500).

During the time that defendants have excluded the plaintiff from said land and premises the said defendants have assumed the right to lease, and have let various parties into the possession of portions of said land, and have been exacting from and receiving from such parties large sums of money claimed by said defendants as rental of the portions of land severally occupied by them, such sums amounting in all, as plaintiff is informed and believes, to at least fourteen hundred and fifty dollars, which should have been paid to the plaintiff; and that said defendants are continuing to collect from various parties now in such occupancy large sums of money claimed by said defendants under such unlawful pretense, and threaten to continue to do so; that said parties are numerous, are unknown to the plaintiff, and are frequently changing; that said defendant Peter Gardner is insolvent; that said defendants are conspiring together to defraud this plaintiff out of the rents and profits of said land, and to that end are endeavoring to mislead this plaintiff as to which of said defendants is receiving said sums of money, and plaintiff does not know and cannot ascertain the facts in relation thereto, so that it is impossible for this plaintiff to obtain adequate relief in an action at law; that defendants have cut and carried away a large quantity of valuable timber growing upon said land, and threaten to and will, unless restrained by this Honorable Court, continue to cut and

carry away valuable timber therefrom; that there is upon said land so unlawfully occupied by the defendants a building of great value, the property of this plaintiff, which said building this plaintiff believes, and therefore charges, that the said defendants design and intend to either destroy or remove from said land, to the great damage of plaintiff.

And plaintiff avers, that the acts hereinbefore complained of are continuous, and that their continuance during the litigation of this action, and the cutting and carrying away timber from said land, and the destruction or removal of said or any building from said land, or either the continuance of said acts or said cutting of timber or said destruction or removal, would produce great injury to the plaintiff, for which he is remediless at law.

Wherefore, plaintiff prays judgment for the restitution of said land and premises, for the sum of five hundred dollars damages for the withholding thereof; and for damages estimated at the rate of fifty dollars per month, the value of the rents and profits of said land and premises, from the 1st day of February, 1891, until the day of the judgment to be entered herein, together with costs of suit; that until the further order of this Court the said defendants, and each of them, their and each of their servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of them, or either of them, or claiming or to claim by, through, or under them, or either of them, be enjoined and commanded to absolutely refrain from and desist from leasing to or letting any person or persons into possession of any portion of said land and premises, and from receiving from any person or persons any sum of money whatever in consideration of the occupancy of any portion of said land and premises; and from cutting or interfering with any timber growing upon said land; and from destroying or removing from said land any building or structure whatever, and from interfering in any manner with said land and premises, or any portion thereof; and for such other or further relief as may be just and equitable.

TAYLOR & CRAIG,
Attorneys for Plaintiff."

(Duly verified).

The answer, cross-complaint, and answer thereto of defendant in error are as follows:—

Answer.

I.

[Title of Court and Cause.]

"Now come the defendants, Peter Gardner and Jacob Gardner, and for answer to the first count of the Complaint on file in the above-entitled action.

Deny that on the 1st day of February, 1891, or any other time, the plaintiff was or for a long or any time prior thereto, had been the owner of, or in the possession of, or entitled to the possession of, or from thence hitherto, or from any period of time or ever, has been the owner of or entitled to the possession of the land described in said Complaint or any part thereof, or any of the tenements, hereditaments, or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said Complaint, as is described as follows:—

'A.' Beginning at a post marked "C. M. P. 180," running thence due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending the said creek to the point of beginning.

'B.' Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho, thence along said fence north 8 degrees 10 minutes west 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet, south 16 degrees 55 minutes west 143 7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.

2d. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portion thereof hereinbefore described, the defendants without right or title, or wrongfully, or unlawfully, or otherwise, or at all entered into or upon the said land or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all

into or upon any part of said excepted parcels of said land, or that said defendants, or either of them, have ever since wrongfully, or unlawfully, withheld the possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them, have ever wrongfully or unlawfully, or otherwise or at all, withheld, or still, or now withhold the possession or any part of said excepted parcels of land hereinbefore described, from the plaintiff, or that the plaintiff has ever been damaged by any withholding by defendants of said land from him in the sum of $500.00 or any other sum of money, but on the contrary these defendants aver that the defendant, Jacob Gardner, and his predecessors in estate, were at the date of the commencement of this action, and for more than forty years next prior thereto, had been and still are the owners of and in the open, actual, and adverse possession of all of the lands described in said Complaint, except so much thereof as is hereinbefore described, and that the defendant, Peter Gardner, has for more than two years last been upon the said premises under and in subordination to the said Jacob Gardner and his title.

3d. And defendants deny that the value of the rents and profits of said land and premises described in said Complaint during the time it is alleged that plaintiff has been excluded therefrom, is the sum of $1500.00, or any other sum greater than $100.00.

Deny that the reasonable monthly value or any monthly value of the rents and profits of the lands and premises or the lands or premises described in the Complaint is or ever was about $50.00 per month or any value per month greater than $10.00 per month, or that by reason of the unlawful withholding or any withholding of said land and premises, or said land or premises, by defendants, or either of them, plaintiff has been deprived, or by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of $50.00-100 per month or any sum of money greater than $10.00-100 per month.

II.

And defendants, for answer to the second count of said complaint.

1st. Deny that on the 1st day of February, 1891, or at any other time prior thereto, had been the owner of or in the possession of, or entitled to the possession of, or from thence hitherto, or from any period of time, or ever has been the owner of, or entitled to the possession of the land described in said complaint or any part

thereof, or any of the tenements, hereditaments, or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said complaint as is described as follows:—

A. Beginning at the post marked "C. M. P. 180," thence running due north 2.45 chains to post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale Road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending said creek to the point of beginning.

B. Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio, with the northerly line of said Blythedale Road, running thence N. 9 deg. E. along said line of said rancho to a fence which runs N. 8. deg. 10 min. W. from the said line of said rancho, thence along said fence N. 8. deg. 10 min. W. 514.5-10 feet, N. 14 deg. 30 min. W. 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle S. 8 deg. 30 min. W. 277.5-10 feet, S. 16 deg. 55 min. W. 143.7-10 feet, S. 22 deg. 11 min. W. to the said northerly line of said Blythedale Road; thence southeasterly along the said northerly line of said road to the place of beginning.

2d. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portions thereof hereinbefore described, the defendants without right, or title, wrongfully, or unlawfully, or otherwise or at all, entered into or upon the said land, or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all into or upon any part of said excepted parcels of said land or that said defendants or either of them, have ever since wrongfully or unlawfully withheld possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them have ever, wrongfully, or unlawfully, or otherwise or at all, withheld or still or now, withhold the possession of any part of said excepted parcels of land hereinbefore described from the plaintiff, or that the plaintiff has ever been damaged by any withholding by defendants of said land from him, in the sum of $500,00 or any other sum of money, but on the contrary these defendants aver that the defendant, Jacob Gardner, and his pre-

decessors in estate, were at the date of the commencement of this action, and for more than forty years next prior thereto, had been and still are the owners of and in the open actual and adverse possession of all of the lands described in said complaint, except so much thereof as is hereinbefore described, and that the defendant Peter Gardner has for more than two years last past been upon said premises under and in subordination to the said Jacob Gardner and his title.

3rd. And defendants deny that the value of the rents and profits of said land and premises described in said complaint, during the time it is alleged that the plaintiff has been excluded therefrom, is the sum of $1500.00 or any other sum greater than $100.00.

4th. Defendants deny that the sums received by them or either of them, as rents of the said land during the period during which it is alleged in said complaint that the plaintiff was excluded therefrom by defendants, amount to the sum of $1450.00 or any sum greater than $550.00.

5th. And defendants deny that they are continuing to collect from various or any parties now in the occupancy of said land, large sums of money, or any sums of money claimed by defendants under any unlawful pretense, and they aver that the sums of money being collected by them, are small sums which they have a right to collect and are rightfully collecting. And deny that the parties from whom defendants are collecting such moneys are numerous or unknown to the plaintiff.

6th. And defendants deny that they or either of them are conspiring together to defraud the plaintiff out of the rents or profits of said land, or to that end or otherwise or at all, are endeavoring to mislead the plaintiff as to which of said defendants is receiving said sums of money, or that plaintiff does not know or cannot ascertain the facts in relation thereto, or that it is impossible for plaintiff to obtain adequate relief in an action at law, and deny that defendants or either of them have cut or carried away a large quantity or any quantity of valuable timber, or any kind of timber growing upon said land described in said complaint, or which ever grew thereon, or that they threaten to, or will unless restrained by this Court, continue to cut or carry away, valuable timber or any timber therefrom, or that there is upon said land occupied by the defendants, a building of great value, or any building which is the property of the plaintiff, and deny that the defendants design or intend, or ever designed or intended to destroy, or remove from the land mentioned and described in said complaint, the building mentioned in said complaint.

7th. And defendants deny that the acts or any act complained of in the second count of plaintiff's complaint, are continuous, or that they were ever committed at all, and deny that the continuance of any act or acts complained of in said complaint during the litigation of this action, or the cutting or carrying away of any timber from said land, or the destruction or removal of said or any building from said land, or either the continuance of said acts, or said cutting of timber, or said destruction or removal would produce great or any injury to the plaintiff, or for which he is remediless at law, and defendants most emphatically deny, that they intend to cut or carry away any timber from said land, or to destroy or remove from said land any building thereon.

8th. And for a further and separate defense to both of the causes of action for damages alleged in plaintiff's complaint:

The defendants allege that during the period during which said defendants have been in possession of the land described in said complaint except the said excepted portions of said land hereinbefore described, the defendants made and erected on the said lands outside of said excepted portions, permanent improvements, consisting of a house and fencing of the value of $2000.00 and that said defendants were at the time of the erection of said improvements, holding said lands under color of title adversely to the claim of the plaintiff in good faith.

Wherefore defendants pray judgment that plaintiff take nothing by this action, and that defendants have and recover from plaintiff their costs, and that they have such other and further relief as may be just and equitable.

HEPBURN WILKINS,
Attorney for Defendants."

(Duly verified.)

Cross-Complaint of Jacob Gardner.

[Title of Court and Cause.]

Now comes the defendant, Jacob Gardner, and by leave of the Court, first had and obtained, files this his cross-complaint against the plaintiff in the above-entitled action, and for cross-complaint against the plaintiff, alleges:—

1st. That on or about the second day of October, 1834, Jose

Figueroa, as the Governor of California, under the Government of Mexico, granted to one Juan Reed, a certain tract of land situated in the State of California, and in what afterwards became the County of Marin, being the tract of land known as and called the Rancho Corte Madera del Presidio.

2d. Defendant avers on his information and belief that the said rancho granted as aforesaid, included within its exterior limits the land hereinafter mentioned, which was conveyed by the deed hereinafter mentioned, from T. B. Deffebach et al. to Julius C. McCeney, dated February 14, 1871.

3d. That in the year 1843, Juan Reed died intestate in the said State of California, leaving surviving him four children, to wit: his son, John J. Reed, his daughter, Maria Inez Reed, who afterwards intermarried with one Thomas B. Deffebach, and thereafter bore the name of Deffebach, his daughter, Hilarita Reed, also known as Hilaria Reed and as Hilaria M. Reed, and his son, Ricardo Reed, which children were the only heirs at law of said Juan Reed, and that the said Ricardo Reed died in the year 1853, intestate, and under twenty-one years of age, leaving the said other children of said Juan Reed his only heirs at law.

4th. That on or about the 12th day of June, 1854, the Board of Land Commissioners for the State of California, made and entered a judgment and order confirming the said grant. That thereafter an appeal was taken from the judgment or order aforesaid of the said Board of Land Commissioners, to the District Court of the United States, in and for the District of California: That thereafter, on the 14th day of January, 1856, a judgment and decree was duly made and entered in the said District Court, whereby it was adjudged that the claim of the appellees who were the said heirs of said Juan Reed, was a good and valid claim, and that the said claim be and the same was thereby confirmed to the extent and quantity of one square league, being the same land described in the said grant, and of which possession was proved to have been long enjoyed, provided that the said quantity of one square league then confirmed, be contained within the boundaries called for in the said grant, and the map to which the grant refers, and if there should be less than that quantity within said boundaries, then that the Court confirmed to the claimants, that less quantity.

5th. That in the year 1858, a survey of the said Mexican grant was made by the United States Deputy Surveyor, R. C. Mathewson, generally known as the "Mathewson survey," and the defend-

ant avers on his information and belief, that the land described in the said deed from T. B. Deffebach et al. to Julius C. McCeney, was outside of the exterior boundaries of Mathewson survey, and within the exterior boundaries of said Mexican grant. That the said Mathewson survey never became final, and that thereafter, in the year 1872, the said Mathewson survey was set aside by the authorities of United States, and a new survey ordered by said authorities.

6th. The defendant avers on his information and belief that thereafter, in the months of November and December, 1873, and June, 1874, a re-survey was made by the authorities of the United States, of the lands embraced by the said Mexican grant, and that said last-mentioned survey of said Mexican grant became the final survey and official survey thereof.

7th. That on or about the 25th day of February, 1885, a patent was issued by the United States to the said John J. Reed, Maria Inez Reed, and Hilarita Reed, for the said Mexican grant of land as surveyed by the survey last-mentioned, and that by the said last-mentioned survey and the said patent, the land described in the said deed from said T. B. Deffebach et al. to said Julius C. McCeney, was excluded.

8th. That on or about the 12th day of August, 1865, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach, and T. B. Deffebach, her husband, made, executed, and delivered for a valuable consideration, to J. Clinton Bolton, a deed, whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in the said Mathewson survey.

9th. That on or about the 16th day of September, 1865, said Bolton made, executed, and delivered to R. Steinback all the undivided one-fourth part of all the said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 28th day of March, 1866, said R. Steinback made, executed, and delivered to Emil Steinback a deed whereby he conveyed to said Emil Steinback the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

11th. That on or about the 16th day of June, 1866, said Emil Steinback made, executed, and delivered to Emil Grisar a deed whereby he conveyed to said Grisar the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

12th. That on the 19th day of June, 1866, the said Emil Grisar made, executed, and delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

13th. That on or about the 26th day of July, 1868, the said J. Clinton Bolton made, executed, and delivered to T. B. Valentine a deed whereby he conveyed to said Valentine all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

14th. That on or about the 11th day of May, 1869, John J. Reed made, executed, and delivered to Hugh A. Boyle a deed whereby he conveyed to said Boyle all the undivided one-sixth part of all the said Mexican grant which was not included in the said Mathewson survey.

15th. That on or about the 24th day of May, 1869, the said Hilarita Reed made, executed, and delivered to said Hugh A. Boyle a deed whereby she conveyed to the said Boyle all the undivided one-sixth part of the said Mexican grant which was not included in the said Mathewson survey.

16th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, and H. C. Newhall made, executed, and delivered to Julius C. McCeney a deed whereby they conveyed to said McCeney all that certain tract of land situated in the County of Marin, State of California, bounded and described as follows, to wit:—

Beginning at a post marked "C. M. P. 181," distant 20 chains north of corner sections 28, 29, 32, and 33, in township one north, range six west, Mount Diablo meridian, from which a madrona tree, four feet in diameter, marked "B. J. C. M. P. 181," bears south 24 deg. east 87 links distant, said post is station 181 on R. C. Mathewson's survey of the Rancho "Corte Madera del Presidio," as approved by the United States Surveyor General of the State of California, September 19, 1859; thence along the line of said Mathewson's survey E. 6.38 chs. to station, a post in stone mound from which an oak tree, 22 inches in diameter, bears N. 17½ deg. W. 33 chs. and said madrona tree bears S. 82½ deg. W.; thence leaving said Mathewson's survey, N. 9 deg. W. 29.90 chs. to station; thence N. 70¾ deg. W. 10.70 chs. to station post marked "A;" thence S. 73¾ deg. W. 16.65 chs. to station in center of the creek, known as the "Arroyo de Corte Madera del Presidio;" thence

down the center of said creek, with the meanders thereof, according to William J. Lewis' survey of the Rancho Saucelito, approved October 2, 1860, by the said Surveyor General, S. 39.¾ deg. E. 150 chs. to station 11 of said Lewis' survey; thence S. 4½ deg. E. 10.74 chs. to station 12 of said Lewis' survey; thence S. 17 deg. E. 8.50 chs. to station 13 of said Lewis' survey; thence S. 35 deg. E. 10.30 chs. to station 14 of said Lewis' survey; thence S. 71¼ deg. E. 10.78 chs. to station 15 of said Lewis survey; thence N. 70¾ deg. E. 3.90. chs. to station 16 of said Lewis' survey; thence S. 33¾ deg. E. 0.40 chs. to station in center of said Arroyo, and on line between sections 28 and 29, township one north, range six west, 17.55 chs. north of corner sections 28, 29, 32, and 33; thence leaving said creek and survey, N. 2.45 chs. to the post marked "C. M. P. 181," the place of beginning. Containing 80.24-100 acres of land.

17th. That on or about the 19th day of January, 1875, the said Julius C. McCeney made, executed, and delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of February 1, 1871, from said T. B. Deffebach et al. to said McCeney.

18th. Defendant avers on his information and belief, that each and all of the grantees named in the deeds aforesaid purchased the lands and interests therein which the said deeds purported to convey in good faith and for a valuable consideration, and that the said grantees used, improved and continued in the actual possession of the said lands, including lot 3 in section 28 and lot 3 in section 29, in township one north, range six west, according to United States Government surveys according to the lines of their original purchases, and that said lands were so used and improved as tenants in common by the said various grantees, until the 14th day of February 1871, on which day, the various tenants in common except said Throckmorton, made the conveyance aforesaid to said Julius C. McCeney, and that said conveyance was made to said McCeney, in trust for said Throckmorton, and in order to segregate the interest of said Throckmorton in said lands and convey the same in severalty to said Throckmorton, and in pursuance of said trust, the said McCeney, made, executed and delivered the said deed of January 19, 1875, to said Throckmorton, and that ever since the said 1st day of February, 1871, up to the date of the deed to defendant, Jacob Gardner, hereinafter mentioned, the said Throckmorton and the executrix of his will after his death, used and improved, and continued in the actual possession of the land described in the said deed of February 1, 1871, to said McCeney, and the deed of Jan-

uary 19, 1875, to said Throckmorton, substantially according to the lines of said deeds, and that said Throckmorton, and all said other grantees at the dates of said several purchasers, believed in good faith that all of the lands conveyed by said deeds as aforesaid, were included within the said Mexican grant to the said Juan Reed, and that the said Throckmorton, in good faith, entertained such belief until the date of his death, and that the said Mexican grant aforesaid, did purport to grant and convey all of the said lands described in the said deeds to the said McCeney and the said Throckmorton.

19th. That on or about the 19th day of January, 1875, the said Throckmorton, as a bona fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under Sec. 7 of the Act of the Congress of the United States, entitled "An Act to quiet titles in California," approved July 23, 1866, basing his application upon the facts hereinbefore set forth, and that the said Ebenezer Wormouth was a party defendant upon the said application of said Throckmorton in said land office, and claimed the said land as a pre-emptor, and contested said application.

20th. And defendant avers on his information and belief, that evidence was introduced in the matter of the application and contest aforesaid, showing without conflict, that all the facts hereinbefore set forth were true, and establishing all of said facts by competent evidence, but, that notwithstanding the said evidence which was given as aforesaid in said United States Land Office in San Francisco upon the said contest, and, notwithstanding that there was no conflict in said evidence, and no evidence whatever on said contest which contradicted the said evidence or any part thereof, and that the said evidence was true, the register and receiver of the land office at San Francisco, on or about the 9th day of February, 1886, basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced before them on said application as aforesaid, the said Throckmorton, was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land, and that on appeal from the said decision to the commissioner of the General Land Office of the United States, on the proofs taken before the said register and receiver, the said commissioner, on or about the 18th day of June, 1890, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as

aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of said register and receiver, and that on appeal from said decision of said commissioner, the Secretary of the Interior of the United States, on or about the 24th day of October, 1891, on the same proofs, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton, was not in law or under the law entitled to purchase the said land, affirmed the said decision of the said commissioner, denying the application of said Throckmorton, to purchase said land under said act.

21st. That thereafter, upon the return of the instructions of the Superior officers on said appeals to the United States Land Office at San Francisco, the Register and Receiver of the said land office, on or about the 20th day of July, 1892, notwithstanding the application of the said Throckmorton, and notwithstanding the fact that the said Throckmorton was entitled to purchase the said land under the said Act of Congress, did contrary to law, and basing their action on the erroneous construction of the law applicable to the case before them, and against the protest and objection of the representatives of said Throckmorton, allow the said plaintiff, Wormouth, to make proof and payment for the said land described in said deed to said Throckmorton, and issued to the said Wormouth, a certificate of purchase for the said land as a commuted homestead entry.

22d. That thereafter, on the 14th day of August, 1893, under and in pursuance of the said certificate of purchase and the rulings aforesaid of said officers of the said Land Department of the United States, a patent was issued by the President of the United States to the said plaintiff, Ebenezer Wormouth, purporting to convey to him the lands described in the said deed to said Throckmorton.

23d. That on or about the 28th day of May, 1883, the said Samuel R. Throckmorton, died in the City and County of San Francisco, State of California, leaving a will by which he bequeathed to his daughter, Susanna M. Throckmorton, all his property and estate.

24th. That on or about the 27th day of June, 1883, an order was duly given and made in and by the Superior Court of the City and County of San Francisco, State of California, whereby the said Susanna M. Throckmorton, who was named in said will as

the executrix thereof, was duly appointed as such executrix, and whereby letters testamentary were duly ordered to be issued to her.

25th. That thereafter, on the 27th day of June, 1883, letters testamentary upon the estate of said decedent, were duly issued to the said Susanna M. Throckmorton, who then was and up to the date of the distribution of the estate of said decedent, continued to be the duly appointed, qualified and acting executrix of the will of said decedent.

26th. That on or about the 23d day of September, 1889, an order and decree was duly given and made in and by said Superior Court of said City and County, whereby the whole estate, real and personal, of said decedent, was distributed to the said Susanna M. Throckmorton.

27th. That on or about the 17th day of July, 1890, the said Susanna M. Throckmorton, made, executed and delivered to the defendant, Jacob Gardner, a deed, whereby she conveyed to the said defendant, Gardner, all those certain parcels of land situate, lying and being in the County of Marin, State of California, and described as follows, to wit :—

Lot 3 of section 28 and lot 3 of section 29, township one north, range six west, Mt. Diablo base and meridian. Containing 43 acres of land more or less. Being a part of the property conveyed by and described in said deed from Julius C. McCeney to Samuel R. Throckmorton.

28th. That on the said 17th day of July, 1890, defendant, Jacob Gardner, entered under the said last-mentioned deed into the possession, and has thence hitherto remained in the possession of the land conveyed by and described in the said deed, except so much thereof as is described as follows, to wit :—

Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chs. to a post marked "C. M. P. 181"; thence north 9 deg. east to a road known as the Blythedale road ; thence northwesterly along said road about 10 chs. to a fence; thence southwesterly along said fence to the creek on the easterly boundary line of the Rancho Saucelito ; thence descending the said creek to the point of beginning.

That the defendant, Jacob Gardner, was always prevented by the plaintiff from entering into the possession of said excepted parcel.

29th. And defendant, Jacob Gardner, avers that he is the owner in equity of the said land described in the said deed from Susanna

M. Throckmorton to him, and that the legal title to said land, which is included in said patent from the United States to said Ebenezer Wormouth, is held in trust by the said plaintiff, Wormouth, for the defendant, Jacob Gardner.

Wherefore, defendant prays for a judgment of this Court that the land described in the said deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, and the title thereof conveyed by the patent from the United States to the plaintiff, issued on the 14th day of August, 1893, is held by the plaintiff in trust for the defendant Jacob Gardner, and that the said plaintiff be commanded and required to execute, acknowledge and deliver to the defendant, Jaco Gardner, a deed conveying to him all the said lands described in the said deed from said Susanna M. Throckmorton, and including the land described in said Complaint, and that the defendant, Jacob Gardner, have such other and further relief as may be just and equitable, together with the costs of this action.

HEPBURN WILKINS,
Attorney for Defendant, Jacob Gardner.

(Duly verified.)

Answer to Cross-Complaint.

Title of Court and Cause].

The above-named plaintiff, Ebenezer Wormouth, answers the cross-complaint filed against him by the above-named defendant, Jacob Gardner, in the above-entitled action, as follows:—

1. This plaintiff, in answer to the second paragraph of said cross-complaint, denies that the rancho granted by the Governor of California, under the Government of Mexico, to Juan Reed, included within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. Denies that the grant mentioned in the first paragraph of said cross-complaint included any part of the land in controversy in this action. Denies that any grant ever made by the Mexican Government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

2. Answering the 5th paragraph of said cross-complaint, this plaintiff denies that the land described in said deed of T. B. Deffe-

bach et al. to Julius C. McCeney, or any part thereof, except as in this answer hereinbefore set forth, was within the exterior boundaries of said Mexican grant.

3. Answering the 8th paragraph of said cross-compiaint, this plaintiff denies that on the 12th day of August, 1865, or at any other time, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach, and T. B. Deffebach, her husband, or any of them, made, executed, or delivered for a valuable or any consideration, except as hereinafter stated, to J. Clinton Bolton a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in said Matthewson survey, but plaintiff avers that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the U. S. Courts and authorities to procure a patent for more land than was included in said Matthewson survey, or if no more land was patented, to procure such patent for the land included in the Matthewson survey.

4. In answer to the 16th paragraph of said cross-complaint, plaintiff denies that on or about the first day of February, 1871, or on any other day, month, or year, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, and H. C. Newhall made, executed, or delivered to Julius C. McCeney a deed whereby they conveyed all that certain tract of land situated in the County of Marin, State of California, bounded and described as set forth in said paragraph 16 of said cross-complaint, or any part of said land, save and except a small part thereof which lies within the boundaries of the patent for said land which was issued to the said Reed heirs on the 25th of February, 1885, which said excepted portion of said land lies without the boundary of the land described in plaintiff's complaint in this action; and in that behalf this plaintiff avers that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, nor H. C. Newhall did, on or about the first day of February, 1871, or at any other time, own or was entitled to own or entitled to convey to any one any of the land described in said 16th paragraph of said cross-complaint, save and except that part thereof lying within the bounds of said Reed patent.

5. Answering the 17th paragraph of said cross-complaint, plaintiff denies that on or about the 19th day of January, 1875, or at any other time, the said Julius C. McCeney made, executed or delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of Feb'y 1st

1871, from said T. B. Deffebach et als. to said McCeney, or conveyed any part of said land to said Throckmorton save and except that portion thereof lying within the boundary of said Reed patent; and in that behalf this plaintiff further answering the 17th paragraph of said cross-complaint denies that said Julius C. McCeney did, on or about the 19th day of January, 1875, or at any other time, or at all, own, or was entitled to own, or was seized or possessed or was entitled to convey to any one any of the land mentioned and described in the said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of said Reed patent, no part of which excepted portion lies within the boundary of the land mentioned and described in Plaintiff's Complaint in this action.

6th. Answering the 18th paragraph of said cross-complaint, this plaintiff denies that each, or all, or any, of the grantees named in the deeds mentioned or referred to in said 18th paragraph of said cross-complaint, purchased, or pretended to purchase, the lands or interests described or mentioned in said deeds, in good faith, or for a valuable consideration; denies that said grantees or any grantee named in said cross-complaint used or improved or continued in the actual possession of said lands, according to the lines of their original purchases or ever used, improved or possessed any part thereof, except as trespassers upon the possession and rights of this plaintiff, as alleged in his complaint in this action; denies that lot 3 in section 28 and lot 3 in section 29, township one north range 6 west, were possessed or used or improved by any of the persons named as grantees in said cross-complaint as tenants in common or at all used by any of said persons, except as trespassers as aforesaid, and denies that any part of said lot 3, in section 28, or of said lot 3, in section 29, was ever in the possession of the original purchaser, Bolton, or any of his grantees or successors in interest, until on or about the 1st day of October, 1872, when an attempt was made by said Throckmorten to inclose a portion of the public lands of the U. S. lying to the west of the western boundary of the Rancho Corte de Madera del Presidio, whereupon, to-wit: on or about said 1st day of October, 1872, the plaintiff gave notice to said McCeney and said Throckmorton that the lands they were attempting to inclose or fence were owned and claimed by plaintiff. Denies that said deed to McCeney was made in order to segregate the interest, or any interest, of said Throckmorton. Denies that said Throckmorton or his executrix ever had any right to use or to improve any part of said lot 3 in section 28 or

of said lot 3 in section 29; denies that said Throckmorton or his said executrix was ever in the actual possession of the same or any part thereof except as intruders and trespassers upon the rights and possession of this plaintiff, and particularly deny that said defendants, or either of them, or any of their, or either of their, grantees or predecessors in interest ever were in the possession of the parcels designated respectively "A" and "B" in defendant's answer herein; denies that all, or any, of said grantees, particularly and specially said Throckmorton, believed in good faith, or at all believed, that all of the lands conveyed by said deeds, or any part or parcels of said lot 3 in section 28 and said lot 3 in section 29, were included within said Mexican grant, or that said Throckmorton in good faith, or at all, entertained any such belief; and denies that said Mexican grant did purport to grant or convey all or any part of the lands now in lots 3 in section 28 and lot 3 in section 29.

7. Answering the 19th paragraph of said cross-complaint, this plaintiff denies that on or about the 19th day of January, 1875, or at any other time prior to October 20th, 1880, said Throckmorton made any application to the register and receiver, or either of them, to purchase said lands, and plaintiff denies that on said 20th day of October, 1880, or on said 19th day of January, 1875, or at any other time, the said Throckmorton, as a bona fide purchaser from Mexican grantees made an application to the register and receiver of the U. S. Land Office at San Francisco, under section 7 of the Act of Congress of the United States, entitled "An Act to Quiet Titles in California," approved July 23, 1866, or basing his application upon the facts in said cross-complaint hereinbefore alleged, and denies that said Ebenezer Wormouth claimed the said land on the hearing of said contest before said register and receiver as a pre-emptor, but on the contrary claimed the said land as a homestead claimant and offered proof of his entry and right as such homestead claimant.

7½. Answering the 20th paragraph of said Cross-Complaint this plaintiff denies that the evidence introduced in the matter of the application and contest mentioned in 19th paragraph of said Cross-Complaint showed without conflict or showed at all that all the facts set forth in the preceding paragraphs of said Cross-Complaint were true, or that any of such facts which are in this answer denied or were true; denies that the evidence introduced in the matter of said application and contest established all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; denies

that there was no conflict in said evidence; denies that there was no evidence whatever on said contest which contradicted Throckmorton's evidence or any part thereof; denies that said alleged evidence was true; denies that the Register and Receiver of the land office in San Francisco, or either of them, on or about the 9th day of February, 1886, or at any other time based their, or his decision upon said alleged evidence or upon evidence without conflict; denies that said Register and Receiver, or either of them, rested their or his decision upon the proposition or upon a proposition of law that the said Throckmorton was not in law, or under the law entitled to purchase the said land; denies that the Commissioner of the General Land Office, on appeal from the decision of the Register and Receiver, basing his decision upon evidence without conflict, or resting his decision upon the, or upon a proposition of law, decided that said Throckmorton was not in law entitled to purchase said land; denies that the Secretary of the Interior based his decision upon evidence without conflict; denies that the said Secretary of the Interior rested his decision, affirming the decision of the Commissioner of the General Land Office upon the or upon a proposition of law; denies that said Throckmorton was a bona fide purchaser from the Mexican grantees of the lands described in paragraph 16 of said Cross-Complaint.

8. Denies that said Throckmorton as a bona fide purchaser from the Mexican grantees made the application to the Register and Receiver of the United States Land Office at San Francisco under Section 7 of the Act of Congress entitled, "An Act to quiet titles in California"; denies that said Throckmorton was entitled to purchase said land, or any part thereof under said Act of Congress; denies that the Register and Receiver of the Land Office at San Francisco did contrary to law; or did, basing their decision on an erroneous construction of the law applicable to the case before them, allow this plaintiff to make proof and payment for said land.

9. This plaintiff in answer to the matters alleged in paragraph 27 of said Cross-Complaint denies that on or about the 17th day of July, 1890, or at all, the said Susanna Throckmorton made, executed, or delivered to the defendant, Jacob Gardner, a deed whereby she conveyed to said defendant, Gardner, all those certain parcels of land described as lot 3 of Section 28, and lot 3 of Section 29, Township 1 North, Range six West, Mt. Diablo Base and Meridian. And in that behalf this plaintiff avers that said Susanna Throckmorton was not the owner of said land when she executed said alleged deed nor was she entitled to convey the same to said Gardner.

10. This plaintiff denies that on the 17th day of July, 1890, or at any other time, the defendant, Jacob Gardner, entered into the possession of said land under said deed from said Susanna M. Throckmorton, and denies that he has ever since remained in possession of said land except as an intruder and trespasser upon the possession of this plaintiff, and further denies that said defendant, Jacob Gardner, ever entered into the actual or other possession of any part of the lands described respectively as "A" and "B" in the defendant's answer herein.

11. This plaintiff denies that said Jacob Gardner is, or ever was, the owner in equity of said land or of any part of the land described in plaintiff's complaint in this action, and in the United States patent issued to him on the 14th day of August, 1893, as alleged in the 22d paragraph of said Cross-Complaint; denies that this plaintiff holds said land or part thereof in trust, or otherwise or at all for the defendant, Jacob Gardner.

Wherefore plaintiff prays that defendant, Jacob Gardner, take nothing by his said Cross-Complaint, that the same be dismissed, and that plaintiff have judgment as prayed in his complaint herein.

E. B. MAHON, AND
L. D. McKISICK,
Attorneys for Plaintiff.

(Duly Verified.)

The action came on regularly for trial before the Court, certain issues as to damages for use and occupation having been submitted to a jury.

Evidence was produced by both sides, and thereafter, and on March 8, 1897, the Court made its decision in writing, the findings of fact and conclusions of law being separately stated, said decision being as follows:—

Findings of Fact and Conclusions of Law.

[Title of Court and Cause.]

"This cause came on regularly for trial, without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant, Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived. The plaintiff appeared by Messrs. E. B. Mahon and L. D. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney.

Evidence was introduced on behalf of the respective parties, and the case was duly argued and submitted, and by the Court taken under advisement, and the Court, being now fully advised, finds the following facts:—

1st. That on the 20th of October, A. D., 1880, S. R. Throckmorton, defendant Jacob Gardner's predecessor in interest, filed an application in the office of the Register and Receiver of the United States Land Office, at San Francisco, California, to purchase lot 3, in section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼ section 29, township 1 north, range 6 west, Mt. Diablo Meridian, under the 7th section of the Act of Congress of the United States, entitled "An Act to quiet Land Titles in California," approved July 23, 1866.

That the plaintiff, Ebenezer Wormouth, was a party defendant upon said application of said Throckmorton in said Land Office, and on the hearing thereof claimed the said lot 3 in section 28, and said lots 2 and 3 in section 29, as a homestead claimant, and contested said application of Throckmorton.

2d. That one of the questions decided by the United States Register and Receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of *Throckmorton* v. *Wormouth*, mentioned in the 20th paragraph of said cross-complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

3d. That the officers of the United States Land Department, to wit, the Register and Receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said Register and Receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican Government to Juan Reed.

4th. That a survey known as the Matthewson survey of said Rancho Corte de Madera del Presidio (commonly called the Reed Ranch) mentioned in the 1st paragraph of said cross-complaint, was made by authority of the United States, about seven years before the date of the deed of August 12, 1865, from John J. Reed and others to J. Clinton Bolton, under whom defendant, Jacob Gardner, deraigns title, being the deed mentioned in the 8th paragraph of said cross-complaint. That said survey excluded the lands in controversy, and no survey of the said Rancho Corte de Madera del Presidio ever made by authority of the United States included the lands in controversy.

5th. That the consideration paid by said Bolton to the Reed heirs (John J. Reed and others) for the said deed to him of 1865 was not a money consideration, that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the United States Courts and authorities to procure a patent for more land than was included in said Matthewson survey, or if no more land was patented, to procure such patent for the land included in the Matthewson survey.

6th. That the officers of the United States Land Department, to wit, the United States Register and Receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of "*Throckmorton* v. *Wormouth*," in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns.

7th. This Court further finds as follows: That the rancho granted by the Governor of California, under the Government of Mexico, to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of February 14, 1871, or any part thereof, except so much thereof as in included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. That the grant mentioned in the first paragraph of said cross-complaint, did not include any part of the land in controversy in this action. That no grant ever made by the Mexican Government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

8th. That the land described in said deed of T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant.

9th. That on the 12th day of August, 1865, John J. Reed and others made, executed, and delivered to J. Clinton Bolton, for the consideration mentioned in the 5th finding above set forth, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant, which was not included in said Matthewson survey.

10th. That on or about the 1st day of February, 1871, T. B.

Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine, and H. C. Newhall made, executed, and delivered to Julius C. McCeney a deed purporting to convey all that certain tract of land situated in the County of Marin, State of California, bounded and described as set forth in paragraph 16 of said cross-complaint.

But that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, nor H. C. Newhall, did on the said 1st day of February, 1871, or at any other time, own, or was, or were entitled to convey to any one any of the land described in said 16th paragraph of said cross-complaint, except a small part thereof which lies within the boundaries of the patent for certain land, which was issued to the said Reed heirs on the 25th day of February, 1885, which said excepted portion of said land lies entirely without the boundary of the land described in plaintiff's complaint in this action.

11th. That on the 19th day of January, 1875, the said Julius C. McCeney, made, executed and delivered to S. R. Throckmorton, a deed purporting to convey to said Throckmorton, all of the land described in the said deed of February 1, 1871, from said T. B. Deffebach et al. to said McCeney, but that the said McCeney on said 19th day of January, 1875, or at any other time was not the owner and was not entitled to convey to any one any of the land mentioned and described in said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of said Reed Patent, no part of which excepted portion lies within the boundary of the land mentioned and described in plaintiff's complaint in this action.

12th. That none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross-complaint, purchased the lands or interests described or mentioned in said deeds, in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff as alleged in his complaint in this action.

That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in Sec. 28 or of said lots 2 and 3 in Sec. 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

That the said defendants, nor either of them, nor any of their nor either of their grantors or predecessors in interest, ever were in the

possession of the parcels designated respectively "A" and "B" in defendants' answer herein.

That the said grantees and each of them and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by said deeds, or any part or parcel of said lot 3 in Section 28 and said lots 2 and 3 in Section 29, were included within the said Mexican grant.

That said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in Section 28 and lots 2 and 3 in Section 29.

13th. That the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint, did not show without conflict, or show at all, that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest, did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross-complaint was not true.

That the Register and Receiver of the Land Office at San Francisco, did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict; that the said Register and Receiver did not, nor did either of them, rest their or his decision, upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law, or under the law entitled to purchase the said land.

That the Commissioner of the General Land Office, on appeal from the decision of the Register and Receiver, did not base his decision upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton* v. *Warmouth*, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint.

14th. That the said Throckmorton did, claiming to be a bona fide purchaser from Mexican grantees, make said application (to purchase) to the Register and Receiver of the United States Land Office at San Francisco, under Section 7 of the Act of Congress entitled, "An Act to quiet Land Titles in California."

That the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns and was not entitled to purchase the said land or any part thereof under said Act of Congress.

That the Register and Receiver of the said land office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land.

15th. That on or about the 17th day of July, 1890, Susanna M. Throckmorton made, executed and delivered to the defendant, Jacob Gardner, a deed in due form purporting to convey to said defendant Gardner, all those certain parcels of land described as lot 3 of Sec. 28 and lots 2 and 3 in Sec. 29, T. 1. N. R. 6 W. Mt. Diablo base and meridian; but the said Susanna M. Throckmorton was not the owner of said land when she executed said deed, nor was she entitled to convey the same to said Gardner.

16th. That the defendant, Jacob Gardner, did not on the 17th day of July, 1890, or at any other time, enter into the possession of said land, under said deed or remain in possession thereof, except as an intruder and trespasser upon the possession of the plaintiff, and that the said defendant, Jacob Gardner, never entered into the actual or other possessions of any part of the lands described, respectively as "A" and "B" in the defendant's answer herein.

17th. That the said Jacob Gardner is not and never was the owner in equity of said land, or of any part of the land described in plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22nd paragraph of said cross-complaint.

That said plaintiff does not hold said land or any part thereof in trust or otherwise, or at all for defendant, Jacob Gardner.

And as a conclusion of law from the foregoing facts:

The Court finds that neither the said defendant, Jacob Gardner, nor the defendant, Peter Gardner, should take anything by said cross-complaint, or by said supplemental answer.

Dated March 8, 1897. F. M. ANGELLOTTI,

Judge.

The judgment upon the same was rendered April 21, 1897, as follows:

Judgment.

[Title of Court and Cause.]

This cause heretofore, to wit, on the 9th, 12th, 13th and 19th days of February, 1897, came on regularly for trial before the Court without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived.

The plaintiff appeared by Messrs. E. B. Mahon and L. D. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney. Evidence was introduced on behalf of the respective parties and the case was duly argued and submitted, and by the Court taken under advisement, and afterwards, to wit: on the 8th day of March, 1897, the Court duly made and filed its written findings of facts and conclusions of law herein.

And afterwards, to wit: on the 19th, 20th and 21st days of April, 1897, this cause came on regularly for trial as to the issues raised and joined by the answer of the defendants to the plaintiff's amended complaint herein, a jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of the plaintiff and defendants respectively were sworn and examined, and oral and documentary evidence on behalf of the respective parties was offered and put in evidence.

After hearing the evidence and the arguments of the counsel, and the instructions of the Court, and the jury having retired to consider their verdict, and subsequently returned into Court, and being called answered to their names and say they find a verdict for plaintiff, as follows:

[Title of Court and Cause.]

"We, the jury, in the above-entitled cause, find for the plaintiff for the recovery from the defendants of the possession of all the land in controversy (viz.: the 46.26–100-acre tract described in the complaint, except the two portions thereof described in the answer and designated therein "A" and "B") and we assess the damages for withholding the said property at Two Thousand ($2,000) Dollars, for which sum we find for plaintiff against said defendants.

"A. GERICKE,
"Foreman."

Wherefore by reason of the law and the findings and verdict aforesaid, it is ordered, adjudged and decreed that the defendant Jacob Gardner take nothing by his said cross-complaint, and that defendants take nothing by their supplemental answer herein, and that the plaintiff, Ebenezer Wormouth, do have and recover of and from the defendants, Peter Gardner and Jacob Gardner, the possession and restitution of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:—

Beginning at post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio, running thence along said boundary line due north 2.45 chains to post marked "C. M. P. 181," thence north 9 degrees east 20.25 chains, thence leaving said boundary line due west 26.00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot three (3) of Section twenty-eight (28) and lot three (3) of Section twenty-nine (29) in township No. 1 north, range No. 6 west, M. D. M., containing forty-six and twenty-six hundredths (46.26–100) acres of land, with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, (except that portion thereof bounded and described as follows:

"A." Beginning at a post marked "C. M. P. 180," running thence due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho, thence along said fence north 8 degrees 10 minutes west 514.5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277.5-10 feet, south 16 degrees 55 minutes west 143.7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.)

2d. That the said plaintiff do have and recover of and from the said defendants the sum of Two Thousand ($2,000) Dollars damages for withholding said property.

3d. That the said plaintiff do have and recover of and from the said defendants his costs and disbursements herein, taxed at $240.76.

Done in open Court this 21st day of April, A. D., 1897.

F. M. ANGELLOTTI,
Judge.

Entered April 22d, 1897.

THOS. F. BONNEAU,
Clerk.

Thereupon plaintiffs in error moved for a new trial, which application was denied. An appeal was taken to the Supreme Court of the State of California from the judgment and from the order denying a new trial, and on July 6, 1899, the same were affirmed, and the Court delivered the following opinion:—

Filed July 6, 1899.

DEPARTMENT TWO.

EBENEZER WORMOUTH, *Plaintiff and Respondent,* *v.* PETER GARDNER AND JACOB GARDNER, *Defendants and Appellants.*	S. F., No. 1143.

This is an action in ejectment to recover possession of certain lands described in the complaint. Judgment below went for plaintiff, and defendants appeal from the judgment and from the order denying a motion for a new trial.

Plaintiff claims title under a homestead entry made in accordance with the United States laws upon that subject (see *Wormouth* v. *Gardner*, 105 Cal. 149), and before the filing of the cross-complaint hereinafter mentioned he received a United States patent for the land in pursuance of his homestead entry. The principal contention of defendants for a reversal is in relation to what they call their *equitable title*. This title, as shown in the cross-complaint, is briefly as follows: It is averred that the land in contest here was within the exterior boundaries of a certain Mexican grant, made in 1835, to Juan Reed, of a certain tract of land called the Rancho Corte de Madera del Presidio—usually called the Reed Rancho; that this grant was

presented to the Land Commissioners and the United States District Court, and was confirmed; that a United States patent to the rancho was issued to the heirs of Reed in February, 1885, and that the patent excluded the land in contest in this case, and that the Reed heirs supposed the land was included within said grant, and with that understanding conveyed the same to various parties, through whom, by mesne conveyances, whatever right they had to this piece of land became vested in the defendant Jacob Gardner, whose immediate grantor was one Throckmorton. It is further averred, that in January, 1875, the said Throckmorton made application to the United States Land Department to purchase said land, under the Act of Congress, entitled "An Act to quiet titles in California," approved July 23, 1866, basing his application upon the facts hereinbefore stated, and that the plaintiff herein, Wormouth, was made a party defendant in said application, and that a contest took place in the Land Department between Throckmorton, upon his claim as aforesaid, and Wormouth as a homestead claimant; that the Register and Receiver of the United States Land Office at San Francisco, in which application was made, decided the case in favor of Wormouth, and against Throckmorton; that Throckmorton appealed to the Commissioner of the General Land Office, who also decided the case against him; and that he then appealed to the Secretary of the Interior, who again decided the case against him, and in favor of Wormouth; but that each of said officers decided the case upon an erroneous proposition of law; and that therefore it ought to be decreed that the plaintiff holds said land in trust for defendant Jacob Gardner, and should convey the same to the latter A demurrer to this cross-complaint was sustained by the court below, but upon appeal this Court held that the averments of the complaint were sufficient on their face to show that the decision of the land department had been based upon an erroneous construction of the law, and reversed the case, with directions to the Court below to overrule the demurrer—the Court declaring, however, in its opinion, very clearly, the principles upon which it should be determined whether or not the decision of the Land Department was final. See *Wormouth* v. *Gardner*, 112 Cal. 506. After the remititur went down, the plaintiff filed an answer in which all the material averments of the cross-complaint were denied. Upon the trial the defendants introduced all the proceedings had in the Land Department in the said contest of Throckmorton and Wormouth. That contest was one entirely within the jurisdiction of the United States Land Department, that is, each party was endeavoring to get title to what

each admitted to be United States government land, which was subject to disposition under the laws of the United States. The Land Department, therefore, had exclusive jurisdiction to determine all facts which arose in the contest; and in order to successfully attack the decision of the department the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law. But this he has failed to do. The department, among other things, found that the land in contest never was within the boundaries of the grant to Reed; that it was never regarded as being included in that grant, and that Throckmorton, at the time he claimed to have purchased from the Reed heirs, either knew or had good reason to believe that the land was not included in the grant, and was not a bona fide purchaser within the meaning of the Act of July 23, 1866. In *Wormouth* v. *Gardner*, 112 Cal. 506, this Court said: "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him, but if, upon the undisputed facts, he made an erroneous application of the law pertinent to those facts, his action is open to review." In the case at bar it nowhere appears that the Secretary of the Interior made an erroneous "application of the law," but it does appear that his decision was based upon facts which necessarily defeated the claim of Throckmorton. For the same reasons the decision of the United States land department was conclusive as to Wormouth's title as a homestead claimant.

What appellant claims as his legal title was presented to the jury in the shape of an issue as to damages for detention of the land. The jury found a verdict of two thousand dollars, which the court reduced to sixteen hundred dollars. The United States patent to

the Reed heirs was finally determinative of the boundaries of the grant; and we see no other point in the case necessary to be discussed.

The judgment and order appealed from are affirmed.

McFARLAND, J.

We concur:

TEMPLE, J.,

GAROUTTE, J.

Certain documentary evidence was admitted on the trial without objection.

The grant referred to in paragraph 1 of the cross-complaint and the seventh finding of fact and the measurements referred to therein, all of which was in evidence, were as follows:—

"Jose Figueroa, General of Brigade of the Mexican Republic Commanding General Inspector and Superior Political Chief of Upper California.

Whereas; Don Juan Read, naturalized in the United States of Mexico, for his own personal benefit and that of his family, asked for the land known by the name of "Corte de Madera del Presidio as far as "La Punta del Tiburon" bounded by the Mission of San Rafael and the Port of San Francisco; the proper measures and examinations being previously made as required by Laws and Regulations; using the powers which are conferred on me in the name of the Mexican Nation, I have, by decree of this day granted to the aforesaid Don Juan Read the above-mentioned land, declaring to him the ownership of it by these presents, said grant being understood to be in entire conformity with the laws, subject to the approval or disapproval of the Most Excellent Territorial Deputation and of the Supreme Government, and under the following conditions:—

1st. That he will submit to those (conditions) which may be established by the regulation which is to be formed for the distribution of vacant lands, and that in the meantime neither the grantee nor his heirs can divide or alienate that which is granted to them, subject it to any tax, entail, pledge, mortgage or other incumbrance even for pious purposes nor convey it to mortain.

2nd. He may enclose it without prejudice to the crossings, roads and servitudes; he will enjoy it freely and exclusively, applying it to the use and cultivation which may best suit him; but within one year at furtherest, he will build a house and it will be inhabited.

3d. When the ownership is confirmed to him, he will request

the proper magistrate to give him juridical possession in virtue of this patent by whom the boundaries will be marked out, in the limits of which he will place some fruit or forest trees of a useful character.

4th. The land of which donation is made is one square league a little more or less, as shown by the map which goes with the expediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance in order to mark out the boundaries leaving the surplus which may result to the nation for its convenient uses.

5th. If he contravene these conditions he will lose his right to the land and it will be denounceable by another person.

In consequence I order that this present, serving him for a title and being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the person interested for his security and other purposes.

Given at Monterey on the second of October, eighteen hundred and thirty-four.

(Signed) JOSE FIGUEROA.

(Signed) AGUSTIN V. ZAMORANO, Secretary.

Note has been made of this title (in the book) of entries of grants of lands on folio fifty-four, number fifty-two which exists in the Secretaria in my charge. In Monterey on the 2d of October, 1834.

(Signed) ZAMORANO.

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* * * Being in the fields in the place named "Corte de Madera del Presidio de San Francisco" on the twenty-seventh day of the month of November, one thousand eight hundred and thirty-five, I, the constitutional Alcalde, acting in virtue of my office with two assistant witnesses for want of a public Notary, the witnesses by me examined present citizen Juan Read owner of said lands, and citizen Fernando Felis on the part of the Pueblo of San Rafael, as mayor domo of said pueblo and community, the only colindante on the north, I proceeded to see and examine the lands of said rancho, and for greater clearness, mounting on horseback in company with both the parties and witnesses referred to, I ordered the latter to point out to me the places, limits, and boundaries of them,

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according to the signs which they have declared on their depositions, and in conformity they led the way to the west to a canada where they showed me a forest of tall trees which they call redwoods in the canada itself, and some little valleys which form the base of the high peak called "Palmos," which forest is called "Corte de Madera del Presidio," a little brook with a willow thicket, and the remains of a rancheria called "Anamus"; thence continuing the examination and view of said lands they led me north to another arroyo and forest of redwood trees called also "Corte de Madera de San Pablo" and they said it was the boundary with the Pueblo of San Rafael; and thence continuing the examination south as far as Point Taburon, which they said was the limit in that direction; we continued to the west to the point of an Estero which empties in the bight formed by said Point Taburon and Point Caballos on the south and which ends at the entrance of said canada where is situated the house of the owner of said lands, Don Juan Read, the arroyo, willow thicket, and forest of redwood trees named "Corte de Madera del Presidio" aforesaid which they said was the last boundary of the said lands pertaining to the rancho referred to, of "Corte de Madera" of Senor Read; which places I, the constitutional Alcalde, saw and examined with those of my assistance and said witnesses, and the papers presented, having been compared with said examination, the identification of the aforesaid lands proved to be certain according to the declarations of the witnesses; and in testimony I make official record of it and sign it with those of my assistance and others who knew how; to which I certify.

(Sgd.) HARO.
" FERNANDO FELES.
" JOSE DE LA C. SANCHEZ.
" TOMAS JEREMIAS JONES.
" MANUEL SANCHEZ.

Assisting witnesses
(Signed) EUSEBIO GALINDO.
" FRANCISCO SANCHEZ.

The decision of the Board of Land Commissioners, to whom the heirs of Juan Reed, made application under the act of March 3, 1851, referred to in paragraph 4 of the cross-complaint, and which was in evidence, is in the following words and figures:—

HEIRS OF JUAN READ
v.
THE UNITED STATES.

In this case on hearing the proofs and allegations, it is adjudged by the Commission that the said claim of the petitioners is valid and it is therefore hereby decreed that the same be confirmed.

The land of which confirmation is hereby made is the same on which said Juan Read resided in his life time; is known by the name of Corte de Madera del Presidio, is situated in Marin county and bounded as follows. to-wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presidio, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holon where is another forest of redwoods called Corte de Madera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westwardly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the north of the Canada and the point of the "Sausal" which is near the Estero lying east of the house on said premises which was occupied by said Juan Read on November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Read under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the espediente a traced copy of which is filed in the case reference is to be had.

ALPHEUS FELCH,
R. AUG. THOMPSON,
Commissioners.

[Endorsed:] No. 497. Heirs of Juan Reid. Corte de Madera del Presidio. Decree of Confirmation. Filed in office June 13, 1854.

GEO. FISHER,
Secretary.

The judgment of the U. S. District Court affirming the decision of the Land Commissioners last set forth and referred to in paragraph 4 of the cross-complaint, and which was in evidence, is as follows:—

"In the District Court of the United States, Northern District of California.

THE UNITED STATES, *Appellants,* v. HEIRS OF JOHN READ, *Appellees.*	No. 183. Corte de Madera del Presidio. Transcript No. 497.

Stated Term, January 14, 1856.

On appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in California.

Decree.

This cause came on to be heard at a stated Term of the Court on appeal from the final decision of the Board of Commissioners to ascertain and settle the private land claims in the State of California under the Act of Congress approved on the 3d of March, A. D., 1851, upon the transcript of the proceedings and decision of the Board of Commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the Court that the said Transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby in all things affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim, and that the said claim be, and the same is hereby confirmed to the extent and quantity of one square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided that the said quantity of one square league now confirmed to the claimants be continued within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the claimants that less quantity.

OGDEN HOFFMAN, JR.,
U. S. District Judge.

The application of S. R. Throckmorton, on October 20, 1880, to the Registrar and Receiver of the U. S. Land Office at San Francisco, California, and the Hon. Commissioner of the General Land Office, Washington, D. C., under the Act of July 23, 1866, referred to in paragraph 19 of the cross-complaint, and the first finding of fact, and which was in evidence, is as follows:—

"To the Register and Receiver of the U. S. Land Office at San Francisco, California, and to the Honorable Commissioner of the General Land Office, Washington, D. C.:

Now comes SAMUEL R. THROCKMORTON, a native-born citizen of the United States, over the age of twenty-one years, residing in the City and County of San Francisco, State of California, and respectfully shows that he is a purchaser of a portion of the Rancho Corte Madera del Presidio in Marin County, State of California, granted to Juan Reed by the Mexican Government, and confirmed by the U. S. District Court for the Northern District of California, surveyed by the U. S. Surveyor General for California, and the survey, so far as the western line of said Rancho Corte Madera del Presidio is concerned, duly approved by the Honorable Secretary of the Interior, by his decision dated May 3rd, 1880, and hereby applies to purchase under the 7th Section of the Act of Congress, approved July 23rd, 1866, that portion of the Rancho Corte Madera del Presidio, excluded from the final survey of said Rancho, situate, lying and being in sections 28 and 29, township 1, north range 6 west Mt. Diablo meridian, containing seventy-three and 86-100 (73.86) acres, as shown by the accompanying survey of said tract so excluded, made by G. F. Allardt, Deputy U. S. Surveyor for the State of California, and in support of his application to purchase, herewith files his affidavit, together with certified copies of the deeds of conveyance from the several parties from whom he deraigned title, viz: deed from John J. Reed et al. to James C. Bolton, dated August 12, 1865; deed from James C. Bolton to Rodolph Steinbach, dated September 16, 1865; deed from Rodolph Steinbach to Emil Steinbach, dated March 28, 1866; power of attorney from Emil Steinbach to Rodolph Steinbach, dated February 18, 1864; deed from Emil Steinbach to Emil Grisar, dated June 16, 1866; deed from Emil Grisar to S. R. Throckmorton, dated June 19, 1866; deed from J. C. Bolton to Thos. B. Valentine, dated July 25, 1868; deed from John J. Reed to Hugh A. Boyle, dated May 11, 1869; deed from Hilarita Reed to Hugh A. Boyle, dated May 24, 1869; deed from Thos. B. Deffebach et al. to Julius C. McCeney, dated February 1, 1871; deed from Julius C. McCeney to S. R. Throckmorton, dated January 19, 1875.

The tract sought to be purchased was excluded from the final survey aforesaid, and is now in the possession of your petitioner, and he asks that he be permitted to purchase same as provided in the 7th section of the Act of Congress approved July 23, 1866.

That the land sought to be purchased by applicant is included

and embraced within the exterior boundaries of the Rancho Corte Madera del Presidio, granted to Juan Reed by the Mexican Government and confirmed to his heirs by the United States.

S. R. THROCKMORTON.

SAN FRANCISCO, October 20th, 1880.

STATE OF CALIFORNIA, City and County of San Francisco. } ss.

SAMUEL R. THROCKMORTON, being first duly sworn, upon his oath deposes and says: that he is a native-born citizen of the United States, over the age of twenty-one years; is a resident of the City and County of San Francisco, State of California, that he has acquired by purchase from the heirs of Juan Reed, the original Mexican grantee of the Rancho Corte Madera del Presidio, for a valuable consideration, that certain piece or parcel of land in Marin County, State of California, situate in sections 28 and 29, township 1, north range 6 west, Mt. Diablo meridian, containing eighty and 24-100 acres, being a portion of the Rancho Corte Madera del Presidio, granted by the Mexican Government to Juan Reed, and confirmed to the heirs of said Reed by the U. S. District Court for the Northern District of California; that said rancho has been surveyed by the U. S. Surveyor General for California; and the western line thereof duly approved by the Hon. Secretary of the Interior, in his decision dated May 3, 1880; that by said survey and decision, the western line of said rancho has become established and approved; that 73 and 86-100 acres of the land purchased by affiant from the heirs of Juan Reed, Mexican grantees or their assigns, has been excluded from the final survey of said Rancho; that said tract of land so excluded is embraced within the exterior boundaries of the Rancho Corte Madera del Presidio, confirmed to the heirs of Juan Reed, and forms a part thereof; that affiant, ever since June 19, 1866, has been in the actual, quiet and peaceable possession of said tract of land, according to the lines of the original grant and deed of conveyance to him, and has used and improved the same, save and except that portion described in the field notes—(marked Exhibit "A")—attached hereto and made a part hereof, which is not in his possession, but it is also sought to be purchased by him; that a portion of the land, viz: 6 and 38-100 acres, so purchased, is included in the survey of the Rancho Corte Madera del Presidio; that a survey of said tract of land excluded from the final survey of said rancho and sought to be purchased by affiant has been made by G. F. Allardt, Deputy U. S. Surveyor, and the field notes thereof are filed

herewith and made a part hereof — marked Exhibit "B" — that there are no valid adverse rights or titles to said tract of land to his knowledge; that the government lands in township 1, north range 6 west, Mt. Diablo meridian, have been surveyed, and by order of the Honorable Commissioner of the General Land Office, the official plat of survey was filed in the U. S. Land Office at San Francisco, California, on the 2d day of August, 1880; that this is the first opportunity affiant has had to present his claim for the land excluded from the final survey of said rancho, and he now applies to purchase the same as provided by the 7th section of the Act of Congress, approved July 23, 1866; that to the best of affiant's knowledge and belief the lands sought to be purchased contain no mines of gold, silver, copper, or cinnabar; that the tracts of land sought to be purchased are designated on the official plat of township 1, north range 6 west, Mt. Diablo meridian, as lot No. 3 of section 28, containing 3 and 16-100 acres; part of lot 2, section 28, containing 2 and 27-100 acres; part of northeast quarter of section 29, containing 22 and 16-100 acres; part of lot 2, section 29, containing 2 and 87-100 acres, and the whole of lot 3, section 29, containing 43 and 10-100 acres, making a total of 73 and 86-100 acres; that the land purchased as aforesaid, is inclosed by a good, substantial inclosure; that the land not in possession of affiant, viz: 14 and 61-100 acres is within his said inclosure and a suit in ejectment is now pending wherein affiant seeks to recover the possession of the same. S. R. THROCKMORTON.

Subscribed and sworn to before me this 20th day of October, 1880. J. A. ROBINSON,
U. S. Commissioner.

The decision of the U. S. Land Office at San Francisco upon said application referred to in paragraph 20 of the cross-complaint and the second and third findings of fact and which was in evidence, is as follows: —

DECISION OF U. S. REGISTER AND RECEIVER.

U. S. Land Office,
San Francisco, Cal'a,
Aug. 11, 1885.

S. R. THROCKMORTON,
v.
EBENEZER WORMOUTH.

The records of this office show that S. R. Throckmorton, on October 20, 1880, made application to purchase, under 7th section Act of July 23, 1866, lot 3, Section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ Section 29, T. 1 N. R. 6 W., M. D. M.

Ebenezer Wormouth filed D. S. No. 10661, December 18, 1874, alleging settlement March 1, 1859, for lot 3, Section 28, and lot 3, Section 29, same township and range.

Said filing was decided to be premature and illegal by letter of Hon. Commissioner G. L. O. of Aug. 31, 1880—"G" in case of R. S. Brown.

Said Wormouth on September 14, 1880, filed D. S. No. 15517, alleging settlement, March 5, 1859, claiming the same land as in his previous filing. On May 20, 1881, said Wormouth made H. E. No. 4415 upon the same land. Township plat filed December 5, 1874. Sections 16, 17, 20, 21, 28, and 29, suspended March 1, 1875. Suspension removed except as to lots 2 and 3, Section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ Section 29, August 12, 1875, by letters of Surv'r Gen'l for California of August 7, 1875.

Plat withdrawn from office August 13, 1875, and returned and filed in this office August 2, 1880. The testimony shows that in August, 1865, the heirs of Reed, the Mexican grantee of the Rancho "El Corte de Madera del Presidio," made a conveyance to one Bolton of one undivided half interest in all land in the said rancho outside of the Mathewson survey of the same; the consideration being $1.00 and other considerations.

In June, 1866, Throckmorton purchased from a party holding under Bolton an undivided one fourth of said rancho, outside of the Mathewson survey. None of the deeds prior to 1866 in the chain of title from Bolton to Throckmorton conveyed any land by specific boundaries or any land but an undivided interest in such land as was included within the "El Corte de Madera del Presidio" outside of the lines of the Matthewson survey.

In January, 1875, the various parties holding an interest in the land in said rancho outside of the Matthewson survey joined in a deed to Throckmorton conveying a specific tract, but whether that deed included the land in contest or not is immaterial, since it does not appear that any one of the grantors named therein had any interest in any land not included in the Rancho "El Corte de Madera el Presidio" in July, 1866, or had acquired it from any party who had purchased the land in good faith from the Mexican grantee or his assigns prior to that date.

Throckmorton's claim must therefore be rejected, for the reason

that neither he nor his grantors prior to July 23, 1866, had purchased the tract applied for from the Mexican grantee of the Rancho "El Corte de Madera del Presidio" or from his assigns.

Wormouth, in 1859, purchased the improvements of a prior occupant on a tract that included the land applied for with other land since included in the lines of Corte de Madera Grant.

His first house was included within one survey of that grant. He then built another, and that also was included in another survey of the same grant. In 1880 he built a third house on that part of his claim, that is, outside of the grant, and on the land in contest. His residence, improvement, and cultivation so far have been sufficient to show his good faith, and he should be allowed to enter the land on advertising according to law and making final proof.

CHAS. H. CHAMBERLAIN,
Receiver.

WM. R. WHEATON,
Register.

The decision of the Secretary of the Interior on the appeal of said case from the Department of the Interior, General Land Office at Washington, D. C., to which Department an appeal had been taken by said Throckmorton, and by which the decision of the Land Office at San Francisco had been sustained—referred to in paragraph 20 of the Cross-complaint and the third and fourth Findings of Fact, which were in evidence, is as follows:—

Department of the Interior,
Washington,
October 24, 1891.

S. R. THROCKMORTON
v.
EBENEZER WORMOUTH. } Mexican Grant.

Commissioner of the General Land Office,

SIR:—I have examined the record in the case of S. R. Throckmorton against Ebenezer Wormouth, involving the right to lot 3, section 28, and lots 2 and 3, and the S. E. ¼ of the N. E. ¼ section 29, T. 1 N., R. 6 W., San Francisco, California.

The land is claimed by Wormouth under his homestead entry, made May 20, 1881.

Throckmorton's claim is based on a purchase from the heirs and assigns of Juan Reed, the grantee under a Mexican grant, known

as the Rancho *Corte de Madera del Presidio*, which was confirmed by the Board of United States Land Commissioners, June 13, 1854.

The description in said confirmation was, by metes and bounds, as follows:—

"The land of which confirmation is hereby made is the same on "which said Juan Read resided in his lifetime; is known by the "name of Corte de Madera del Presidio; is situated in Marin "County and bounded as follows, to wit: — Commencing at the "Solar which faces west, at a point at the slope and foot of the "hills which lie in that direction and on the edge of the forest of "redwoods, called Corte de Madera del Presidio, and running from "thence in a northwardly direction four thousand, five hundred "varas, to an arroya called Holon, where is another forest of red-"woods called Corte de Madera de San Pablo; thence by the waters "of said arroyo and the Bay of San Francisco ten thousand varas to "the Point Taburon, said point serving as a mark and limit; "thence running along the borders of said bay and continuing "in a westwardly direction along the shore of the bay formed by "Point Caballos and Point Taburon, four thousand, seven hundred "varas to the north of the Canada and the point of the 'Sausal,' "which is near the Estero lying east of the house on said prem-"ises, which was occupied by said Juan Read in November, 1835, "and thence continuing the measurement from east to west along "the last line eight hundred varas to the place of beginning: con-"taining one square league of land, be the same more or less; "being the same land described in the testimonial of juridical pos-"session on file in this case, as having been measured to said Juan "Read under a grant of the same to him."

This claim was surveyed in 1858 by United States Deputy Surveyor R. C. Mathewson. This survey was of quantity and made to approximate one square league and contained 4,460.24 acres.

August 12, 1865, the heirs of Juan Read (original grantee from the Mexican Government) conveyed to one James C. Bolton, a lawyer of New York City, "All the undivided one-half part of all the "Rancho Corte de Madera del Presidio . . . which is not in "the survey of said rancho, which was made under instructions "from the U. S. Surveyor General for the State of California by "R. C. Mathewson." Subsequent to the sale of this undetermined and undivided interest . . . to wit: In November and December, 1873, and June, 1874 . . . a re-survey was made by direction of this Department, which was accepted by your office, and patent issued for the land therein described. February, 25, 1885.

The last survey, upon which patent issued, described the grant by metes and bounds, and was intended to conform to the description contained in the original grant by the Mexican Government. This survey contained 7,854.12 acres, or 3,393.88 acres in excess of the Mathewson survey.

It was a one-half interest in this excess that was conveyed to Bolton, and the consideration therefor was his "professional services" in procuring a new survey and patent for all the land thus shown to be embraced in the grant.

June 19, 1866, Throckmorton, through several transfers from Bolton, procured title to an undivided half of Bolton's interest, or an undivided one-fourth interest in that part of the rancho not included in the Mathewson survey.

January 19, 1875, the heirs of Read and their transferees conveyed to Throckmorton, by metes and bounds, the land in controversy, containing between seventy-three and seventy-four acres. This land is not included in the grant to Read as last surveyed, nor can I find from the record that it was included in the Mathewson survey. Throckmorton claims the right to purchase it under the 7th section of the act of July 23, 1866 (14 Stat., 218).

That section provides:

"That where persons in good faith and for a valuable considera-
"tion have purchased lands of Mexican grantees or assigns, which
"grants have subsequently been rejected, or where the lands so
"purchased have been excluded from the final survey of any Mex-
"ican grant; and have used, imposed, and continued in actual pos-
"session of the same as according to the lines of their original pur-
"chase, and where no valid adverse right or title (except of the
"United States) exists, such purchasers may purchase the same."

It cannot, I think, be seriously contended that the interest acquired by Bolton to the undivided "half-part" of the land in excess of the Mathewson survey that should be acquired by a new survey, is such an interest as would entitle him or his transferee, Throckmorton, to purchase under said act. His rights, if he has any, must depend upon his purchase of January 19, 1875, in which he purchased by metes and bounds, from the heirs and assigns of Juan Read, the land in controversy, which joins the Rancho Corte de Madera del Presidio on the west.

At the date of this purchase, the new survey had already been made, and was awaiting approval by this Department, which fact must have been known to Throckmorton, for he had long before

acquired title, through Bolton, to an undivided one-fourth interest in the excess that should be procured by the new survey. That survey did not embrace the land in controversy, but formed a part of the eastern boundary thereof; in other words, the land claimed by Wormouth and Throckmorton is immediately west of the western boundary of the rancho, as established by the last survey, which said western boundary, according to the best evidence I can get from the record, is the same as that established by Mathewson. In order that he may be entitled to purchase under said section 7, it must appear that he was a purchaser in *good faith* * * that is, as I construe it, he must have believed that the lands so by him purchased were within the limits of the grant, as originally defined, where, as in this case, the granted land is described by metes and bounds. If, on a proper survey by the government, the land so purchased should be found to be outside the limits of the grant, he would be entitled to purchase under said section, because he had originally purchased and paid for the land in the honest belief that his grantors had the right to convey.

I find nothing in the evidence to convince me that this land was ever occupied, cultivated, or improved by Reed, his heirs, or assigns, prior to the purchase by Throckmorton. The only evidence of any occupation prior to 1872, other than Wormouth's, is the testimony of Throckmorton himself and his rentor, that as far back as 1857 there was a fence along the southwestern boundary of the land in dispute. Who built the fence, or for what purpose, is not shown in the evidence, it may have been to mark the northern boundary of the Rancho Saucelito, which joins this on the south, or it may have been placed there by some one designing to claim the land from the government, or for many other purposes. The evidence is entirely insufficient to show that Read or his heirs or assigns placed it there either to improve or mark the boundary of their claim.

It is true that in 1872, prior to his purchase, Throckmorton inclosed the land with a fence, and has been grazing the same ever since, except about fourteen acres included in Wormouth's house lot. He claims that this was done in pursuance of an amicable partition, setting apart his interest, the deed to which was made by the several grantees to one McCeney, and by him conveyed to Throckmorton, January, 19, 1875.

It is shown in evidence that, at the time Throckmorton commenced to inclose this land (1872), he was notified by Wormouth (who was there residing on the land) of his claim thereto.

The evidence on the part of Wormouth shows that he has made his home on the land ever since 1859, and that at that time and ever since the land was understood in the neighborhood to be government land and was never supposed to be included in the grant to Read.

The evidence shows beyond the shadow of a doubt that at the several dates at which Throckmorton's interests attached, the boundaries to this grant were in dispute, and that he purchased with full knowledge of the unsettled condition of the boundaries. His first purchase of an undivided half of Bolton's interest was made on speculation, and depended for its value on a change in the boundaries as established by the Mathewson survey. His purchase in 1875 of the land in controversy was made before these boundaries had been finally established and with full knowledge of that fact, as well as the claim of Wormouth.

Section 7 of the Act referred to was not, in my judgment, intended for the protection of such a purchaser, but applies only to a purchaser who buys relying on the boundaries as generally accepted and supposed to be the correct ones, and which afterwards, by the final survey, are found to be incorrect, whereby his land is shown to be outside the grant, and affords no protection to one who buys knowing that the boundaries are in dispute, and that a new survey has already been ordered to determine the true boundaries. Such a purchaser must abide the result of the survey and cannot and should not be allowed to claim the right to purchase land under said Act that has for more than twenty years been occupied, claimed and improved by a settler and claimed under the government land laws. But, aside from the speculative character of this purchase, an examination of the record history of this grant satisfies me that Throckmorton is without a plausible pretext to be considered an innocent and unsuspected purchaser.

The grant, as shown by the *expediente*, was described by metes and bounds, and was in no sense of the word a float to be located somewhere within defined exterior boundaries.

In the petition of Juan Reed, to the General of the Territory of Upper California, the land is described as "*El Corté de Madera del* "*Presidio* to the *Punta del Tiburon*, as shown by the sketch or plan "which your Excellency has in your possession." In the grant itself it is described as "known by the name of Corte de Madera "del Presidio as far as La Punta del Tiburon, bounded by the "mission of San Rafael and the Port of San Francisco, the proper "measures and examinations being *previously* made as required by "laws and regulations."

In the measurement made by the Alcalde, when juridicial possession was given to the grantee, the grant is described as starting from a "forest called Corte de Madera del Presidio, a little "brook with a willow thicket, and the remains of a rancheria "called 'Anamus,' thence continuing the examination and view "of said lands they (the witnesses) led me *north* to another "arroyo and forest of redwood trees, called also Corte de "Madera de San Pablo, and they said it was the boundary with "the pueblo of San Rafael, and thence continuing the examination "south as far as point Tiburon, which they said was the limit in that "direction, we continued to the west to the point Estero, which "empties in the bight formed by said point Tiburon and point "Caballos on the south, and which ends at the entrance of said "Canada, where is situated the house of the owner of said lands, "Don Juan Read, the arroyo, willow thicket, and forest of redwood "trees, named Corte de Madera del Presidio, aforesaid, which they "said was the last boundary of the said lands pertaining to the "rancho referred to of Corte de Madera of Senor Read."

The description in the confirmation heretofore given starts from the same point, the "forest of redwoods called Corte de Madera del "Presidio, running thence in a *northwardly* direction four thousand "five hundred varas to an arroyo," etc. Thus, it will be seen that in the expediente, the grant itself, the measurement in the juridical possession and in the decree of confirmation by the United States Commissioners, the land is definitely described as fixed and determined.

In all the measurements and surveys, including the Mathewson and the last approved survey, the starting point was identical, and was on the western boundary of the grant, thence invariably either north (as in the juridical measurement), or northwardly, (as in the confirmation description), to an arroyo (stream) called Hulon, thus showing that the western boundary of the grant from the starting-point to the Hulon was a straight line, and so could not have followed the meanderings of the Arroyo Corte de Madera del Presidio, along which the ancient fence was situated, as claimed by Throckmorton.

These measurements and surveys, except the last one, were of record when Throckmorton's rights attached, and I cannot find that the western boundary was ever in dispute, certainly the land in question was never included in any measurement or survey from which it was excluded by a subsequent one, which was finally approved.

I find that the land in question has always been public land, and has never been regarded by disinterested people as being included in the grant to Read, and that Throckmorton, when he purchased the land in controversy, either knew or had good reason to believe that the land was not included in said grant, and that he was therefore not a bona fide purchaser within the meaning of the Act of July 23, 1866, (14 Stat., 218).

The decision of your office, denying his application to purchase under said act, is accordingly affirmed, and the papers are herewith returned.

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

All of the proceedings of the Land Department were in evidence, and upon the equitable branch of the case, evidence was introduced to support the allegation of the cross-complaint, by both parties for and against, independent of said records.

In the Supreme Court of the United States.

JACOB GARDNER AND PETER GARDNER,
Plaintiffs in Error,
v.
EBENEZER WORMOUTH,
Defendant in Error.

In the Supreme Court of the State of California.

EBENEZER WORMOUTH,
Plaintiff and Respondent,
v.
JACOB GARDNER AND PETER GARDNER,
Defendant and Appellant.

Order Allowing Writ of Error With Supersedeas.

Upon the annexed petition of Jacob Gardner and Peter Gardner, the appellants therein mentioned, and as plaintiffs in error as therein mentioned, through George W. Monteith, Esq., their

attorney, and upon the filing of the petition for a writ of error and assignment of errors, it is hereby ordered that a writ of error be and is hereby allowed to have re-examined and reviewed in the Supreme Court of the United States, the decision and final judgment heretofore entered in the Supreme Court of the State of California in said cause herein, the said Jacob Gardner and Peter Gardner are the appellants and the said Ebenezer Wormouth is the respondent, the said cause being numbered in the records of the Supreme Court of the State of California, "San Francisco, No. 1143."

And it is further ordered that the amount of the bond upon said writ of error, and for the purpose of having suspended and stayed all further proceedings in said Supreme Court of the State of California and in the Superior Court of the State of California, in and for the County of Marin, upon or in pursuance of said decision and the said final judgment of the Supreme Court of the State of California, until the determination of said writ of error by the Supreme Court of the United States, is hereby fixed at twenty-five hundred ($2500) dollars.

And it is ordered that upon the giving by the said Jacob Gardner and Peter Gardner, said appellants as said plaintiffs in error, of said bond in said sum of twenty-five hundred ($2500) dollars, and when approved by the Chief Justice of the Supreme Court of the State of California, the Justice allowing the issuance of said writ of error, that all further proceedings in said Supreme Court of the State of California and in said Superior Court, be stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated August 8, 1899.

(Signed) W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

In the Supreme Court of the United States.

JACOB GARDNER AND PETER GARDNER,
Plaintiffs in Error,
v.
EBENEZER WORMOUTH,
Defendant in Error.

In the Supreme Court of the State of California.

EBENEZER WORMOUTH,
Plaintiff and Respondent,
v.
JACOB GARDNER AND PETER GARDNER,
Defendants and Appellants.

Assignment of Errors.

And now, to wit: on this the day of August, A. D., 1899, Jacob Gardner and Peter Gardner, the above-named plaintiffs in error, come by George W. Monteith, Esq., their attorney, and say: That in the record and proceedings of the above-entitled matter, there is manifest error in this, to wit:—

I.

The said Supreme Court of the State of California erred in affirming the judgment of the Superior Court of said State, in and for the County of Marin therein, in the following particulars, to wit:—

(*a*) In holding and deciding that the finding of said Superior Court upon the evidence before it, to wit:—

"1st. That on the first day of February, A. D., 1891, plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto, had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto had been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying, and being in the County of Marin, State of California, and bounded and described as follows, to wit:" (particularly describing the land that was the subject matter of the cause of action then pending between the parties hereto in said Superior Court); was sustained by the evidence in the case.

(*b*) In not holding and deciding that the said plaintiff therein, Ebenezer Wormouth was not the owner of the land in controversy, or any part thereof, in that the evidence in said case did show without any material or substantial conflict whatever that the defendant therein, Jacob Gardner, was, on the first day of February, A. D., 1891, the owner of said premises then in the possession thereof, and then entitled to the possession thereof, and from thence hitherto had been the owner, and entitled to the possession thereof, and

that his ownership and title to said premises was, by reason of his being through mesne conveyances there in evidence, the successor in interest of John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, who, at the time of the acquisition of California from the Mexican government, were the Mexican owners of the premises and under the Treaty of Guadalupe Hidalgo entitled to remain in possession thereof at that time (their right thereto having been confirmed by the United States District Court for the Northern District of California, in a proper proceeding concerning the same, under the Act of Congress of March 23, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California."

(c) In holding and deciding that the finding of said Superior Court, to wit:—

"That on said first day of February, A. D , 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without any right and title, wrongfully and unlawfully entered into and upon the same and ousted and ejected plaintiff from the same," (excepting certain specific portions) was sustained by the evidence in said case.

(*d*) In not holding and deciding that upon the first day of February, A. D., 1891, the said defendant, Jacob Gardner, was lawfully in the possession of said land and premises under a title, right and possession acquired by him through mesne conveyances from Juan Reed, who, in 1835, had obtained a valid title to said premises from the Mexican government, and whose heirs, John J. Reed, Hilarita M., Reed, and Inez Reed Deffebach, at the time the Treaty of Guadalupe Hidalgo was made, were in possession of and who were entitled thereto, under said treaty, and who from the time of said treaty, by themselves and by their successors, including said Jacob Gardner, had been in lawful, continuous, actual, and adverse possession of said premises from the month of November, 1835, down to and including said first day of February, A. D., 1891.

(*e*) In not holding and deciding that the evidence before said Superior Court, as contained in the record upon the appeal therefrom to said Supreme Court of said State of California, did show, without any material or substantial conflict, that Jacob Gardner was the owner of said premises, in the possession thereof, and entitled to a possession thereof, under a valid and vested right and title thereto, under the constitution and laws of the United States, and under the Treaty of Guadalupe Hidalgo, and as the lawful successor in interest of the said John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, to whom the same had been decreed by the

United States District Court in and for the Northern District of California.

II.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that under the Constitution and laws of the United States, the right and title claimed by the said plaintiff Wormouth to the premises, was invalid and was based upon and under a pretended homestead entry, that had been made by the said Wormouth, in the United States Land Office at San Francisco, California, and that was predicated upon a forcible entry of the said Wormouth into a portion of the premises in controversy, at a time when the predecessors in interest of the said Jacob Gardner, were in lawful, actual, exclusive and adverse possession thereof, and at a time when the United States was not in possession of any portion thereof.

III.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the title claimed by said plaintiff Wormouth, was one based wholly upon and under the laws of the United States, with reference to the disposition and sale of the public lands of the United States by the United States Land Department, and was one wherein the officers of said Land Department had assumed to convey to the said Wormouth the premises in controversy, which the evidence in the record before said Supreme Court, did show, without any material or substantial conflict, never was a part of, and never had been a part of or included within the public lands of the United States, and to which the United States never had any lawful right, title or interest in, or claim to, and which the officers of the United States in the Land Office at San Francisco, California, and in the Land Department of the United States, never had or had had any jurisdiction of or control over, under the laws and Constitution of the United States, but which for many years prior to, and at the time of the acquisition of California by the United States, under said treaty, were and ever since have been private lands, and held and owned by the predecessor in interest of said Jacob Gardner, whose title thereto accrued long before the making of said Treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, and which right and

title was recognized by and vested in them by said treaty, and by them, through mesne conveyances transmitted to said Jacob Gardner.

IV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that the rights claimed by both parties to the premises in controversy, were dependent wholly upon, and were under the Constitution, treaties and laws of the United States, and that under the Constitution, treaties and laws of the United States, the title, ownership, and right of possession claimed by the said Wormouth, were invalid and wholly void.

V.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that as it appeared in the evidence contained in the record before said Supreme Court, without any material or substantial conflict, that the entire claim of the said plaintiff, Wormouth, to the premises was as a homestead claim under the laws of the United States; at the time the proceeding was instituted he had not acquired any title from the United States to the premises.

VI.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the original homestead entry under which the said plaintiff, Wormouth, claimed title to the premises in controversy was void, in that it appeared that at the time said entry was made S. R. Throckmorton, the predecessor in interest of the said Jacob Gardner, was in actual, exclusive, and adverse possession of the premises, claiming under a right and title vested in him by virtue of said treaty, against that of the United States, and by reason of which, under the laws, treaties, and Constitution of the United States said homestead entry, and all subsequent proceedings in the Land Department based thereon, were absolutely void.

VII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing

the same, upon the ground that all questions of title to, possession, or ownership of the premises in controversy, of both parties, were upon and under the Constitution, treaties, and laws of the United States, under which it appeared in the record before said Supreme Court, without any material or substantial conflict, that the title claimed by the said plaintiff, Wormouth, was wholly void, and that the title claimed by the said defendant, Jacob Gardner, was thereunder valid and well vested.

VIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of said Superior Court, to wit:—

"1st. That on the first day of February, A.D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto had been the owner of and entitled to the possession of that certain piece or parcel of land and premises" (describing the premises described in the complaint in said action in said Superior Court), was under the Constitution, treaties, and laws of the United States, wholly contrary to and unsustained by the evidence in said case appearing in the record on appeal before said Supreme Court.

IX.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of the Superior Court, to wit:—

"2d. That on said first day of February, A.D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said lands and premises the defendants, without right or title, wrongfully and unlawfully entered into and upon the same," and ousted and ejected plaintiff from the same (excepting a certain portion thereof therein described), was under the Constitution, treaties, and laws of the United States, contrary to and unsustained by the evidence.

X.

That the Supreme Court of the State of California erred in affirming the judgment of the said Superior Court, and in not reversing the same, upon the ground that the instruction of said Superior

Court to the jury upon the trial in said Superior Court, whereby said jury was instructed that its verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence in that the evidence without any material or substantial conflict showed an absolute right and title thereto in said Jacob Gardner, under said treaty and the Constitution and laws of the United States.

XI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the findings of said Superior Court, and the verdict of the jury therein, upon which said judgment was based, were under the Constitution, treaties and laws of the United States, wholly unsupported and unsustained by the evidence, and were contrary to the same adduced upon the trial in said Superior Court, it appearing in the record on appeal before said Supreme Court, without any material or substantial conflict that said Jacob Gardner held absolute right and title thereto, under the provisions of said treaty and the laws of the United States relating thereto.

XII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the evidence before said Superior Court appearing in the record on appeal before said Supreme Court, did show without any material or substantial conflict, that the lands in controversy, lay east of the western boundary of the Rancho Corte Madera del Presidio, and were included therein, accordingly as the same were possessed by Juan Reed from November, 1835, and by him down to the time of his death, by his heirs after his death, and by their successors in interest, down to and including the said defendant therein, Jacob Gardner, secured by said treaty and the Constitution and laws of the United States.

XIII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court, without any material or substantial conflict, that the premises in controversy were included within the boundaries of the Rancho

Corte Madera del Presidio, accordingly as the same were secured by said treaty and confirmed to the heirs of Juan Reed by the final decree of the United States District Court of the Northern District of California, of January 14, 1856, and because that the title and interest of the said heirs of the said Reed to the premises in controversy, had become vested in said defendant, Jacob Gardner, through mesne conveyances from their successors in interest.

XIV.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court that under the laws of the United States, under which the said plaintiff, Ebenezer Wormouth, claimed title to said premises, he had acquired no title to ownership in or right of possession to the premises in controversy, or any part thereof, and that he was not entitled to maintain the action in said Superior Court, as against the defendant, Jacob Gardner, or any other person, in that his original homestead entry and all proceedings based thereon, were void, under the laws and Constitution of the United States.

XV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, and in not ordering the same dismissed or abated upon the ground that in the record on appeal from said Superior Court before said Supreme Court, it was shown conclusively said Superior Court was without jurisdiction to adjudicate any of the issues involved in said cause of action, in that the jurisdiction to determine said controversy lay wholly within the Courts of the United States, under the said Act of Congress of March 3, 1851.

XVI.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the whole controversy in said Superior Court turned upon the location of the boundaries of the Rancho Corte Madera del Presidio, which, under the Constitution and laws of the United States, and being based upon a right under a treaty of the United States, and under its Constitution and laws, could only be determined by the Courts of the United States, which had exclusive jurisdiction to determine the same.

XVII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that said Superior Court was without jurisdiction to determine the subject matter of the controversy involved in said cause of action before it, the same being vested exclusively in the United States District Court for the Northern District of California, by said act of March 3, 1851.

XVIII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the controversy before the Superior Court involved the right, title, ownership and possession of the premises there in controversy, which right, title, ownership and possession being dependent wholly upon a treaty of the United States, to wit: The Treaty of Guadalupe Hidalgo was by the Constitution and laws of the United States, and particularly by the Act of Congress of March 3, 1851, hereinbefore referred to, exclusively cognizable and determinable in the District Court of the United States of the Northern District of California, and the Supreme Court of the United States, and in that the question of the right, title, ownership and possession there involved, had been finally adjudicated and settled in said District Court by a final decree of said District Court, confirming the right and title of the heirs of Juan Reed to the land in controversy (together with other lands), and the right and title thereto being a right and a title under said treaty, was drawn in issue in Superior Court, which Superior Court found erroneously adversely thereto, and basing its judgment upon such finding, erroneously rendered judgment against the said defendant therein, Jacob Gardner, and which judgment was affirmed by said Supreme Court, notwithstanding that said right and said title under said treaty was there fully presented and argued, and the decision of said Supreme Court of the State of California was thereby against said right and said title, under said treaty claimed by the said defendant, Jacob Gardner, as the successor in interest of the said heirs of Juan Reed, the confirmees under said decree of said District Court, and thereby denied the said defendant, Jacob Gardner's right and title under said treaty to said premises.

XIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing

the same upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed title to the premises in controversy, under the treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his title and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California in a decree which became final and filed in said District Court January 14, 1856; the title of said heirs of said Juan Reed thereto, through mesne conveyances upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid title claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said title claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and because the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the

same; and because, by reason of said decision of said Supreme Court of the State of California affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his title to said premises duly claimed by him and duly vested in him by reason of said Treaty of Guadalupe Hidalgo and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following ground: That in said Superior Court and in said Supreme Court, the said defendant, Jacob Gardner, claimed right and title to the premises in controversy, under the Treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his right and possession of said premises descended and became vested in, and were possessed by his children, John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, who, as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California, and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid, were entitled to retain the property they then possessed which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California, in a decree which became final, and filed in said District Court, January 14, 1856; the right of said heirs of said Juan Reed thereto, through mesne conveyances, upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises, continuing ever since that time, and said premises having been in the actual, adverse, and lawful possession of the successors in interest

of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid right claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision, and judgment of said Superior Court thereon, was against said right claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and before the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same. And because, by reason of said decision of said Supreme Court of the State of California, affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his right to said premises duly claimed by him and duly vested in him, by reason of said Treaty of Guadalupe Hidalgo, and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said title of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same, was against said right of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXIII.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground

that said judgment of said Superior Court was beyond its jurisdiction in that it in effect reviewed and set aside the said decree of said United States District Court of January 14, 1856, so far as the same confirmed the right and the title of said Jacob Gardner and his predecessors to said premises.

XXIV.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was against the right and title of said Jacob Gardner to said premises as secured to his predecessors by said Treaty of Guadalupe Hidalgo.

XXV.

The said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, and in not reversing the same, upon the ground that the title, ownership, and possession of the premises there in controversy, and the question of title thereto, had been finally adjudicated in the District Court of the United States, for the Northern District of California, in its aforesaid decree of January 14, 1856, and upon the further ground of said Superior Court was without power, authority, or jurisdiction to change, alter, or review the lawful effect of said decree, and was without jurisdiction to settle any right of the parties thereto, or their successors in interest, including said defendant, Jacob Gardner, finally determined or settled or adjudicated thereby.

XXVI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, on the ground that the title and the right was one insured and guaranteed to the said heirs of said Juan Reed, and to their successors in interest, including said defendant, Jacob Gardner, under said Act of Congress of March 3, 1851, to the premises in controversy.

XXVII.

The said Superior Court of the State of California erred in affirming said judgment of said Superior Court, upon the ground that the said Superior Court, by its said judgment, had in excess of its authority and jurisdiction, decided against and held invalid the right and title of the Reed heirs to the premises in controversy,

under the Treaty of Guadalupe Hidalgo, and which was confirmed to them and finally adjudicated valid by the United States District Court, by its said final decree of January 14, 1856, and to which right and title said Jacob Gardner had succeeded, as shown by certain mesne conveyances from said Reed heirs and their successors in interest, mentioned in the pleadings, and proved by the evidence at said trial, without any conflict whatever.

XXVIII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the sole question of right and title to the premises in controversy, before said Superior Court, was upon the validity of the right and title to said premises claimed by said Jacob Gardner, whose claim was that, as the successor in interest of said Reed heirs, the Mexicans who owned and possessed said premises at the time said treaty was executed and went into effect, his right and title to said premises which was secured to said Reed heirs by said treaty, and of the Constitution and laws of the United States relating thereto, and which had been confirmed to them by said United States District Court of the Northern District of California by its said decree of January 14, 1856, and that his ownership of said premises was the same ownership as their ownership and as their lawful successor in interest thereto, and that their possession beginning with that of their ancestor, Juan Reed, in November, 1835, had continued uninterruptedly through them and their several successors in interest down to and including the said Jacob Gardner, at the time of the commencement of said action, and ever since, and that his said right and title to said premises was the only issue before said Superior Court, upon which it based the following findings, to wit:—

1st. That on the 1st day of February, A.D., 1891, the plaintiff, Ebenezer Wormouth, was and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit:—

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181";

thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning being lot 3 of Section 28, and lot 3 of Section 29, township No. 1, north of Range No. 6 west M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." And that the judgment of said Superior Court, being based upon that finding and decision against said title and right claimed under said treaty by the said Gardner, was contrary to the provisions of the Constitution, treaties and laws of the United States, relating thereto, and operated to destroy, set aside and annul a valid and vested right and title belonging to the said Gardner under the provisions of said treaty, and the Constitution and laws of the United States.

XXIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that there was no evidence before said Superior Court, upon which there was raised any material or substantial issue of fact, upon any point or question involved in said claim of right and title of said Jacob Gardner, under said treaty, and there was nothing to sustain said finding set out in the preceding assignment of error number XXVIII, and that said finding of said Superior Court, was found by said Superior Court solely because it appeared that the said Land Department had issued a patent to said Reed heirs after they had parted with their title and possession to the premises in controversy to certain of their successors in estate, who were the predecessors in estate of the said Jacob Gardner, and which patent fixed the boundaries of said Rancho Corte Madera del Presidio, upon different lines from those established by said decree of said United States District Court, of January 14, 1856, in this, to wit: the said decree of said United States District Court adjudged said boundaries to be the same as laid down in the original grant of said rancho to said Juan Reed in 1835, and which grant of possession fixed the western boundary of said rancho, upon a line that ran west of the premises in controversy, and which began as therein specified at the "solar" or house lot of the said Juan Reed, and thence ran north to the waters of the Arroyo Holon, and that the northern boundary of said rancho, beginning where said western boundary ended at a forest of sustain, or that even tended to show that the western boundary line

redwoods in said Arroyo Holon, continued eastwardly along the waters of said Arroyo Holon, and that said western and northern boundaries as laid down and fixed in said grant of possession to said Juan Reed, which was confirmed by and which became a part of said decree of said District Court, included the premises in controversy, within the boundaries of said rancho, and the said rancho, according to said boundaries, and after his death, as aforesaid, his said heirs went into possession thereof, and continued in actual possession thereof until they conveyed the same to the predecessors of said Jacob Gardner, as alleged in the cross-complaint of Jacob Gardner in said Superior Court.

That according to said grant of possession to said Juan Reed, confirmed by said District Court, as aforesaid, the said Western boundary beginning at said "solar" as aforesaid, went thence west of north accordingly as exemplified therein, and particularly in the map attached to said grant of possession.

That said patent issued by said Land Department to said Reed heirs, was issued upon the 25th day of February, 1885, and the boundaries of said grant, according to said patent, did not commence at said "solar" or house lot, but on the contrary, commenced at another point about three-quarters of a mile therefrom, and which point was pretended to be said "solar" and they ran said boundary from said pretended "solar," thence south to the Arroyo Corte Madera del Presidio, upon an entirely different line from that fixed and specified by said decree of said District Court, to wit: said boundaries as laid down in said grant of possession to said Juan Reed; that the western boundary of said Rancho, according to said patent, ended at said pretended "solar," and ran east of the premises in controversy, and wholly excluded from the northern boundary of said Rancho the waters of said Arroyo Holon; that said western boundary, according to said patent, beginning at its southermost point, ran east of north, as against that of said grant of possession, which ran west of north; that said patent was based upon a map compiled in said Land Office, and which map was not made lawfully upon a survey under the laws of the United States; that in the evidence in said Superior Court, it was proved, without any material or substantial conflict, that said "solar" was located, where said defendant, Jacob Gardner, claimed the same was located, and where the decree of said District Court located it, and said evidence also proved, without any conflict whatever, that the western boundary of said Rancho lay west of the premises in controversy and not east of them; that there was no evidence in said record to in any wise

contained in said patent conformed in any respect to said decree of said District Court, but on the contrary said evidence, without any material and substantial conflict whatever, showed that, said western boundary lay west of said premises, and not east thereof, and that the line as delineated and laid down in said patent, in no wise followed the decree of said District Court, but on the contrary said patent specified that the boundaries of said grant commencing at the "solar" went south to the Arroyo Corte Madera del Presidio, wholly contrary to said decree, and in violation of its express mandate, but was made solely by said Land Department, and was made without authority of law.

That the whole basis upon which said finding of said Superior Court was based was the mere fact that said Land Department, in compiling its map and survey, and in issuing its patent, had thereby excluded the premises in controversy from said rancho, contrary to said decree of said United States District Court, and notwithstanding that no court of competent jurisdiction had ever decreed otherwise than said District Court, and that the said Jacob Gardner and his predecessors in estate had held actual, continuous and adverse and lawful possession of said premises from the time the same was originally granted to said Juan Reed in November, 1835, as aforesaid, down to the time of the commencement of said action in said Superior Court, and ever since, and notwithstanding that the right and title of the said Jacob Gardner to said premises was a right claimed and held under said Treaty of Guadalupe Hidalgo, under said decree of said District Court, and under the Constitution and laws of the United States, and which had been finally settled and adjudicated.

XXX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the action was prematurely commenced in said Superior Court by said Wormouth, as plaintiff, and in that at the time of the commencement of the same, the said Wormouth's application therefor was pending in the Land Department, the patent had not been issued, and if the United States had title to the premises, it had not parted with the same, and said Wormouth claiming none other than the United States title, had none whatever, and could not therefore maintain said action; as under the laws of the United States, the title does not pass or vest in a homestead claimant until the United States patent, conveying the title of the Government issues, except in the case of mere naked trespassers who neither have nor make bona fide claim of title.

XXXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the sole question of title decided by said Superior Court, was one wherein the original primary sovereign title of the United States was at issue, i. e., the question as to whether or not the lands in controversy were ever included with the public land of the United States, or not; whether they were under the Treaty of Guadalupe Hidalgo, public lands of the United States, or the lands of private owners who possessed them at the time of, and prior to the execution of said treaty under the laws of the Republic of Mexico; and that the settlement of that question was one which, under the Constitution and laws of the United States, particularly under the Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California" was vested solely in the Courts of the United States, to wit: The District Court of the Northern District of California, and on appeal therefrom, the Supreme Court of the United States, and because said Superior Court was without jurisdiction to make any determination with reference to the settlement of that question.

XXXII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the question of right and title decided by said Superior Court, was one which had been finally settled and determined by said decree of said United States District Court, and which said Superior Court was without power, authority, or jurisdiction to in any wise determine.

XXXIII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following grounds, to wit:

(*a*) That the evidence was insufficient to justify the second finding of the Superior Court upon the equitable issues in the case to the effect that one of the questions decided by the United States Register and Receiver, and affirmed by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of *Throckmorton* v. *Wormouth*, mentioned in the 20th paragraph of the cross-complaint in said cause, was a question of fact, namely, the location of the western

boundary of the grant made by Governor Figueroa to Juan Reed, and that there was no evidence to support said finding;

(*b*) That the evidence was insufficient to justify the third finding of the Superior Court, upon the equitable issues before it, that the officers of the United States Land Department, to wit: The Register and Receiver, Commissioner of the General Land Office, and the Secretary of the Interior, did decide and find as a fact, upon the evidence produced before said Register and Receiver on said contest, was not included in said original grant by the Mexican Government to Juan Reed, and that there was no evidence to support said finding;

(*c*) That the evidence was insufficient to justify that portion of the fifth finding of the Superior Court, upon the equitable issues before it, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, for the deed to him in 1865, when not a money consideration and that the only consideration which passed from said Bolton to said grantors, was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding;

(*d*) The evidence was insufficient to justify the sixth finding of the Superior Court, upon the equitable issues before it, to the effect that the officers of the United States Land Department, to wit: The United States Register and Receiver, the Commissioner of the General Land Office, and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of *Throckmorton* v. *Wormouth*, in denying said application of Throckmorton, did not base their decision upon the question of law alone, but did find and decide, as a fact, that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary, the evidence showed that said officers of the United States Land Department based their decision in said contest, upon the question of law alone and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, and that there was no evidence to support said finding.

(*e*) The evidence was insufficient to justify, and there was no other evidence to support that portion of the 7th finding of the Superior Court, upon the equitable issues before it, wherein it found that the Rancho granted by the Government of California under the Government of Mexico, to Juan Reed, did not include

within its exterior limits the lands described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al., and the evidence is insufficient to justify, and there is no evidence to support that portion of said 7th finding, wherein it is found that the grant mentioned in the first paragraph of said cross-complaint, did not include any part of the land in controversy in this action, and that no grant was ever made by the Mexican Government, to Juan Reed or his successors in interest, included in any part of the land described and granted to the plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

(*f*) The evidence was insufficient to justify, and there was no evidence to support the eighth finding of the Superior Court, upon the equitable issues before it, to the effect that the land described in said deed from T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

(*g*) That the evidence was insufficient to justify, and there was no evidence to support that portion of the ninth finding of the Superior Court to the effect that the consideration mentioned in the ninth finding of the Superior Court upon the equitable issues before it, to the effect that the consideration mentioned in the fifth finding upon said equitable issues, was the only consideration for the deed mentioned in said ninth finding.

(*h*) That the evidence was insufficient to justify, and there was no evidence to support that portion of the tenth finding of the Superior Court in the equitable issues before it, in which it found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle or H. C. Newhall did, on the first day of February, 1871, or at any other time, own or were entitled to convey to any one any of the land described in the sixteenth paragraph of said cross-complaint, except a small part thereof, which was described in said tenth finding.

(*i*) That the evidence was insufficient to justify, and there was no evidence to support that portion of the 11th finding of the Superior Court, upon the equitable issues before it, which is to the effect that Julius C. McCeney on the 19th day of January, 1875, or at any other time, was the owner, and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said 11th finding, save

and except that portion of said land which lies within the boundary of said Reed patent.

(*j*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 12th finding of the Superior Court, upon the equitable issues before it, which is to the effect that none of the grantees named in the deed mentioned or referred to in the 18th paragraph of said cross-complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff, as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29, and that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff; and the evidence is insufficient to justify, and there is no evidence to support that portion of said 12th finding which is to the effect that said grantees and each of them, and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by the said deeds, or any part or parcel of said lot 3 in section 28 and said lots 2 and 3 in said section 29, were included within said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

(*k*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 13th finding of the Superior Court, upon the equitable issues before it, which is to the effect that there is no evidence to show that the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint did not show without conflict that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

And the evidence is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence, and that there was evidence on said contest that contradicted said Throckmorton's evidence, and that the evidence alleged

in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true;

And the evidence is insufficient to show, and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict;

And the evidence is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law, or under the law, entitled to purchase the said land, and that the Commissioner of the General Land Office, on appeal from the decision of the Register and Receiver, upon the, or upon a proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office upon the, or upon a proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of *Throckmorton* v. *Wormouth*, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to wit: the Register and Receiver, the Commissioner, and the Secretary of the Interior, based his decision and each of said respective decisions upon the proposition of law, to wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

(*l*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 14th finding of the Superior

Court, upon the equitable issues before it, which is to the effect that the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but on the contrary, the fact was and the proofs before said officers showed without conflict that said Throckmorton was a bona fide purchaser from Mexican grantees and their assigns, and was entitled to purchase the said land and every part thereof under said act, and the Register and Receiver of said Land Office did, contrary to law, basing their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

(*m*) The evidence is insufficient to justify, and there was no evidence to support that portion of the 15th finding of the Superior Court upon the equitable issues before it, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed, and that she was not entitled to convey the same to said Gardner.

(*n*) The evidence was insufficient to justify, and there was no evidence to support that portion of the 16th finding of the Superior Court, upon the equitable issues before it, which is to the effect that Jacob Gardner did not, on the 17th day of July, 1890, or at any other time, enter into the possession thereof, except as an intruder and tresspasser.

(*o*) The evidence was insufficient to justify, and there was no evidence to support the 17th finding of the Superior Court, upon the equitable issues before it, to the effect that said Jacob Gardner is not, and never was, the owner in equity of said land or any part of the land described in the plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22d paragraph of said cross-complaint, and that said plaintiff does not hold said land, or any part thereof, in trust, or otherwise or at all, for defendant, Jacob Gardner.

XXXIV.

The said Supreme Court of the State of California erred in that

part of its decision contained in his opinion filed in said cause upon appeal, in the following particulars:—

(*a*) In deciding that "the principal contention of the defendants for reversal was in relation to what they called their equitable title."

(*b*) In deciding that the contest of Throckmorton referred to in said opinion, was one entirely within the jurisdiction of the United States Land Department, in that the record on appeal before said Supreme Court showed without conflict that the contest was not within the jurisdiction of said Land Department, in that it involved a judicial question as to the character of the land in controversy, whether, under the treaty of Guadalupe Hidalgo, it became public land of the United States, or remained the private holding of private owners.

(*c*) In deciding that both parties in said contest in said Land Department were endeavoring to get title in which each admitted the land was United States Government land, and was subject to disposition under the laws of the United States, it appearing in said record on appeal without conflict that said proceeding on the part of Throckmorton was not to obtain title to what he admitted to be United States Government land, but was for the sole purpose of obtaining a quit-claim of the Government's interest in said land, and thereby removing a cloud upon his title.

(*d*) In deciding that the Land Department had exclusive jurisdiction to determine all the facts which arose in said contest.

(*e*) In deciding that the decision of the Land Department in said contest was a decision upon the issues of fact specified in said opinion, in that the transcript of the proceedings in said Land Department in evidence in said Superior Court, and contained in said record upon appeal, did show conclusively that all the evidence before said Land Department was without any conflict as to any material fact; that there were no issues of fact before the Land Department, and that the only decision of the Land Department was upon the legal effect of the undisputed facts in the record before it.

(*f*) In deciding that "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the possession of the same, according to the lines of his purchase were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as belief

that the land he purchassed was included within the original limits of the Mexican grant, were also facts to be determined by that officer, from all the circumstances under which the purchsse was made." That the decision in these particulars is erroneous and contrary to the Constitution and laws of the United States, in that the evidence before said Land Department aforesaid, without any material or substantial conflict whatever, did show that at the time Throckmorton made said application to said Land Department, his right and title to said premises was one that was valid and well vested, and secured to him under said Treaty of Guadalupe Hidalgo, and which had been finally settled and adjudicated in favor of the right and title he claimed by said District Court in its said decree of January 14, 1856, and that by reason of the fact that Throckmorton, at the time of said application, had absolute title to said premises, and as a matter of law, under the Constitution and laws of the United States, the question as to whether he purchased the land for a valuable consideration, or that, that after his purchase, he used, improved and continued in the actual possession of the same, or that that of his good faith in making the purchase, or that that of his belief that the land he purchased was included within the original limits of the Mexican grant, could not be raised in said Interior Department, said Interior Department being concluded, as a matter of law, upon all those facts, and that therefore, there being no issues of fact before said Land Department, the Secretary of the Interior could not render a decision upon any of those facts, but could only render a decision upon the law in the case, and that its decision was therefore but a decision upon the law in the case.

(*g*) In deciding that the decision of the Secretary of the Interior was not an erroneous application of the law, and in deciding that its decision was based upon facts which necessarily defeated the claim of Throckmorton.

(*h*) In deciding that the decision of the United States Land Department, accordingly as the same in said record and appeal was conclusive in favor of respondent Wormouth's title.

(*i*) In deciding that the other points in the case were unnecessary to be discussed.

XXXV.

The Supreme Court of the State of California erred in deciding that the decision of the Land Department was conclusive as to Wormouth's title to the premises in controversy, upon the ground that it amounts to the said appellant, Jacob Gardner, being thereby

deprived of his property by the State of California, without due process of law, in deciding that the Land Department, by its decision in said contest before it, between said Throckmorton and said Wormouth, that the decision of said Department adverse to said Throckmorton, operated to destroy his right and title to said premises under said treaty.

In order that the foregoing assignment of errors may be and appear of record, the respondents present the same to the Court, and pray for such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided.

Wherefore, the said Jacob Gardner and Peter Gardner, as plaintiffs in error, pray that judgment of said Supreme Court of the State of California, be reversed, and that the judgment of said Superior Court of said State of California, in and for said County of Marin, be likewise reversed, and that said Superior Court be directed to grant a new trial of said case.

(Signed) GEO. W. MONTEITH,
Attorney for Appellants in said Supreme Court
as Plaintiffs in Error.

ARGUMENT.

That no Federal question is involved in this action, must, we think, be clearly apparent.

It was conceded on both sides that the treaty of Guadalupe Hidalgo (9 Stat. 922), preserved whatever rights the heirs of Juan Reed had. That under the authority of the Act of March 30, 1851 (9 Stat. 631), those heirs by the steps they took before the Board of Land Commissioners in 1854 and by the affirmance of the decision of the Board of the U. S. District Court, acquired a perfect title to all the land within the boundaries of the Rancho Corte de Madera del Presidio.

Thus nowhere is the validity of any treaty of, statute of, or authority exercised under the statute of the United States drawn in question. Nowhere is any statute of or authority exercised under any State drawn in question. No title, right, privilege, or immunity is claimed under the Constitution, nor is any commission held or authority exercised under the United States drawn in question.

One question only was involved: Was or was not the land in dispute within the boundaries of the Corte de Madera del Presidio Rancho? Plaintiffs in error have claimed that it was. Defendant in error insists that twice the official survey of the United States has excluded it from the Rancho—that the Land Department found that it never was a part of the Rancho—that the State courts found that it never was a part of it.

The only question at any time has been, where was the initial point of the original grant, and in what direction did the western boundary run?

These matters have been decided by competent tribunals and this Court has no jurisdiction to entertain this case.

1. The decision of the Land Office was final upon the legal branch of this case.

2. The judgment of the Superior Court affirmed by the Supreme Court, was final upon the equity branch.

3. The official survey of Allardt and Ransome in 1873 and 1874, referred to in paragraph 6 of the cross-complaint, excluded the land from the Rancho, and is not open to collateral attack.

Upon the first proposition, that the decision of the Land Office affirmed by the Secretary of the Interior was final upon the rights of Throckmorton and settled the character of the land in question, we respectfully call attention to the following authorities:—

Aurora Hill Con. Mng. Co. v. 85 *Mng. Co.*, 34 Fed. 515;
Germania Ins. Co. v. *U. S.*, 19 U. S. App. 10;
Craig v. *Leitensdorfer*, 123 U. S. 213;
Bishop of Nesqually v. *Gibbon*, 158 U. S. 166;
Gonzales v. *French*, 164 U. S. 342.

Confronted by this dilemma, plaintiffs in error sought to invoke the aid of equity in attacking the patent issued to defendant in error upon the ground that it had been issued under an erroneous construction of the law. The cross-complaint was demurred to; the sufficiency of it as against demurrer was upheld in appeal to the Supreme Court of the State (*Wormouth* v. *Gardner*, 112 Cal. 506), the Court saying that plaintiff in error was entitled to relief if the facts supported the allegations. Thus again, upon the equity branch of the case, questions of fact were submitted to the Superior Court for its determination. The findings of fact of the Court, the judgment of the Supreme Court upon appeal from the order deny-

ing a new trial, upon the ground of the insufficiency of the evidence to justify the decision (findings of fact and conclusions of law) were final upon the equity branch of the case.

Egan v. *Hart*, 165 U. S. 188.

There being no question involved but a question of boundary, the United States Supreme Court will not assume jurisdiction.

Almonester v. *Kenton*, 9 How. (U. S.) 1;
Moreland v. *Page*, 20 How. (U. S.) 522;
Lanfear v. *Henley*, 6 Wall. 204.

That an official survey approved cannot be collaterally attacked; see

Russell v. *Maxwell Land Grant Co.*, 158 U. S. 253.

Blocked by the foregoing propositions of law, plaintiffs in error assail the jurisdiction of the Superior Court.

No effort was made to remove the case.

Capital Bank v. *Cadiz*, 172 U. S. 433.

And any such effort would have been unsuccessful under either the act of 1875 (18 Stat. 470) of 1887 (24 Stat. 552) or of 1888 (25 Stat. 533).

In framing this brief, we have relied upon nothing that was not introduced in evidence, and the entire record will add nothing to the position of plaintiffs in error — the only parts omitted are matters of evidence which this Court cannot consider, and we respectfully submit that the motion to dismiss the writ of error should be sustained.

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C. K. BONESTELL,
Of Counsel.